

82-1189

No. _____

Supreme Court, U.S.
FILED

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CLERK

IN THE
Supreme Court of the United States

JANUARY TERM, 1983

UNITED TRANSPORTATION UNION,

Petitioner,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,
NEW JERSEY RAIL OPERATIONS, INC.,

Respondents

and

CONSOLIDATED RAIL CORPORATION

Rule 19 Party

**PETITION FOR A WRIT OF CERTIORARI
TO THE SPECIAL COURT, REGIONAL RAIL
REORGANIZATION ACT OF 1973**

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Dated: January 10, 1983

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QUESTION PRESENTED

Whether a state (New Jersey) commuter authority, the Federal Court below and a Presidential Emergency Board are bound by the clear prior right seniority preservation language of Congress contained in the Northeast Rail Service Act of 1981, or whether the federal and state agencies are free to establish a new railroad seniority system the effect of which is to deprive, unconstitutionally, all affirmative action women and minority hirees of their jobs?

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**PETITION FOR A WRIT OF CERTIORARI
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REORGANIZATION ACT OF 1973**

The petitioner, United Transportation Union (UTU), respectfully prays that a writ of certiorari issue to review the order of the Special Court, Regional Rail Reorganization Act of 1973 entered in this case on December 21, 1982. The judgment and opinion have not yet been rendered.

OPINION BELOW

The opinion of the Special Court, has not yet been rendered. It will be supplied in a supplemental appendix as App. A. The order below is App. B.

JURISDICTION

The judgment of the Special Court has not yet been rendered but will be supplied in a supplemental appendix as (App. C). This petition is governed by § 1152(b) of the Northeast Rail Service Act of 1981 (hereinafter NER-SA), which provides that judgment of the Special Court shall be reviewable only upon petition for a writ of certiorari to this Court to be filed not more than twenty (20) days after the entry of an *order* of the Special Court (App. D).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of NERSA, including pertinent amendments to the Rail Passenger Service Act (RPSA) and the Regional Rail Reorganization Act of 1973 (hereinafter 3R Act), are set forth in the Appendix at pp. 9a-11a. (App. E).

STATEMENT

Proceedings Below

In the past, Consolidated Rail Corporation (hereinafter Conrail), has provided commuter service to the New Jersey area under a subsidiary arrangement with the State of New Jersey as provided by Section 304 of the 3R Act. Pursuant to Section 1136 of NERSA, Conrail was legislated out of the commuter rail business. The commuter lines of Conrail throughout the United States will be taken over by Amtrak Commuter or local commuter authorities at the options of the states involved.

Petitioner, UTU, is a labor union which represents many of the operating crews of the trains presently oper-

ated by Conrail which trains are being taken over by New Jersey Rail Operations, Inc., (hereinafter NJT), pursuant to NERSA.

Respondent in this case is a subsidiary of the NJT which is a public corporation chartered pursuant to the laws of the State of New Jersey to provide commuter service in that state. NJT is a "commuter authority" as defined in Section 1135 (a)(3) of NERSA.

NERSA amended RPSA in order to provide for the orderly transfer of employees from Conrail to the new commuter authorities. This case involves Sections 503 through 510 which prescribe the method under which Conrail commuter employees are to be absorbed by Conrail's successors.

More particularly, this case involves the preservation of seniority rights of the UTU members as their employer changes from Conrail to NJT. Congress provided that the new employers should maintain the employees' prior seniority rights, Sec. 508 (c) (5)(7). Each of the governmental bodies below, i.e., NJT, Conrail, Referee Kasher, the Presidential Emergency Board and the 3-judge 1152(a) Court, have defied the Congressional directive and held that a new form of seniority shall prevail and that after January 1, 1983 prior right seniority will no longer apply.

Pursuant to Section 508(a) NJT, Conrail and the UTU attempted to negotiate a mutually satisfactory implementing agreement. By August 1, 1982 no such agreement had been reached. Section 508(d)(1) requires that, within five days, the parties select a neutral referee in the event that implementing agreement negotiations are not completed by August 1, 1982. The parties were also unable to select an arbitrator by August 6th. Accordingly, pursuant to Section 508(d), the National Mediation

Board appointed Mr. Kasher on September 7, 1982 to resolve all implementing agreement disputes. Referee Kasher entered his decision on October 15, 1982 (App. F, 12a-14a). He found that after January 1, 1983 there would no longer be a prior right seniority system. Rather, there would be a new form of seniority system. The UTU moved for clarification and reconsideration of that decision on October 20, 1982.

There being no Kasher reconsideration, the UTU filed its complaint in this case on November 12, 1982 raising objections to the Kasher award insofar as it established a new form of seniority and scrapped the prior right seniority system (App. G, 15a-16a) which had been mandated by Congress.

On December 1, 1982 the President's Emergency Board adopted the NJT presentation which contained the Kasher new form of seniority (App. H, 17a-19a).

On December 6, 1982 on motion to clarify and reconsider, Mr. Kasher reaffirmed his original decision and held that the old form of prior right seniority would no longer prevail, that although the employees would move over to NJT according to the old seniority system, once over there, a new form of seniority would be employed (App. I, 20a-21a).

On December 10, 1982, the UTU moved the court below for a preliminary injunction holding the seniority status quo, i.e., enjoining the scrapping of the prior right seniority system and enjoining the implementation of the Kasher new form of seniority system based solely upon date of hire.

On December 21, 1982 the Court below entered an order with decision to follow, denying the preliminary injunction and affirming the Kasher abolition of prior right seniority system.

FACTS

The facts are contained in the moving affidavit of UTU General Chairman Charles P. Jones (App. J, 22a to 30a) and the intervenor Suzanne Woodard (App. K, 31a-33a) and are not substantially disputed.

There are approximately 610 UTU employees operating the trains in New Jersey. These positions have been held by Conrail employees. On January 1, 1983 these positions became those of NJT. The legislated spin off of the New Jersey rail system from Conrail to NJT is completed.

The seniority system before the spin off was based on prior and prior prior right system rather than being based solely on the employee's date of hire. Prior right means that an employee has territorial seniority to the original railroad of employment.¹ Prior prior rights refer to an employee's territorial rights which existed through two mergers. e.g., a Conrail employee who had originally hired on the old Pennsylvania Railroad would be said to have prior prior rights to the old Pennsylvania Railroad territory and prior rights to the Penn Central territory.

An employee's prior and prior prior rights were well understood by the company, the unions and the personnel. With each merger over the past four decades these rights were protected by Congress and the negotiators.

¹ Conrail, formed on April 1, 1976 by Congressional merger of bankrupt railroads in the northeast corridor.

Congress in legislating the NERSA spin off specifically provided that the "... Commuter authority . . . shall, to the extent possible, preserve their prior seniority rights.", (508(c)(5)) and "ensure the retention of prior seniority on Conrail . . ." (508(c)(7)).

It could not be contended sensibly that it would be impossible or even difficult to let the 610 UTU positions continue their prior seniority as it was on December 31, 1982. The prior and prior prior right seniority system had continued through multiple mergers, it could continue through a spin off. The seniority status quo could have been maintained.

Referee Kasher thought a straight date of hire seniority system would be "better" and directed that after January 1, 1983 there would no longer be a prior right seniority system.

This bold directive of the referee in the face of the contrary Congressional directive that prior rights should be preserved was sanctioned by the court below in affirming the Kasher award. Continuing the flaunt of the Congressional directive, the President's Emergency Board recommended that prior rights end.

The consequences of abolition of the prior rights system were drastic and pointed out to the Court below in the affidavits of Charles Jones and Suzanne E. Woodard. Employees hired after February 18, 1965 would not make the Kasher list. All black and female employees hired pursuant to affirmative action programs would not be hired according to the Kasher seniority system. The new railroad employer would have an all male, practically all white, work force. The minority employees would preserve their jobs if the congressionally mandated prior right system were continued, but it was not.

REASONS FOR GRANTING THE WRIT

1. **The State, Presidential Emergency Board And The Judicial Contradiction Of A Simple Congressional Directive To Preserve Prior Seniority Rights Constitutes A Reviewable Conflict Between Governmental Agencies At The Highest Level And Portends Labor Strife Throughout The Railroad Labor Force Of The United States.**

The decision below is in direct conflict with a long line of decisions of this Court which hold that in all cases involving statutory construction, the starting point must be the language employed by the Congress. See, *American Tobacco Co. v. Patterson* — U.S. —, 71 L. Ed. 2d 337 (1979). It also conflicts with this Court's view that legislative purpose is expressed by the ordinary meaning of words used in a statute, and that the language used is ordinarily conclusive. *Consumer Products Safety Commission v. G.T.E. Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Richards v. United States*, 369 U.S. 1, 9 (1962). What the Court below did in this case at the urging of the State of New Jersey, was to ally itself with Referee Kasher and the Presidential Board so as to act as super-legislators and decide a different and "better" seniority system in direct contradiction to the Congressional directive to preserve the prior right seniority system of the UTU employees. This is clearly contrary to past holdings of this Court. *American Tobacco Co. v. Patterson*, *supra*, 71 L. Ed. 2d at 757, n.6; *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

The smooth transition from Conrail to the commuter authorities explicitly envisioned by the Congress in NERSA hangs in the balance. Unions cannot stand by and see seniority rights eroded in direct contradiction to the Congressional intent to preserve prior rights. The unions involved have read Congress' dictates, i.e. the . . . Commuter authority . . . shall, to the extent possible, preserve their seniority rights." (508(c)(5)).

After NERSA enactment, the Unions' prior rights were safe. Next the unions were met with the notice of the State of New Jersey that it did not intend to grant any prior rights; next, the Kasher decision denied prior right seniority protection; next the Presidential Board sided with the State of New Jersey, and, finally, the Court below affirmed the abolition of prior rights. To expect the union leadership, in the face of such high level governmental contradiction, to lead its enraged membership to a smooth transition is unrealistic.

The importance of the issue far exceeds the expected labor turmoil generated by the executive and judicial meddling in the prior right seniority area which Congress had specifically preserved. The issue involves the freedom of Congress, within the bounds of the Constitution, to legislate toward such ends as it chooses without interference from the Judiciary, the states or Presidential boards. This is particularly so given the intensive federal concern with railroads in general. See *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980). Such high level conflict between the three branches of the United States government and a state should be reviewed by this Court.

2. **The Implementation Of The New Kasher Seniority System And Elimination Of The Prior Right System By The Efforts And/Or Concurrence Of The State Of New Jersey, Presidential Emergency Board And The Court Below Will Result In *De Facto* Racial And Sexual Discrimination In Violation Of Title VII Of The Civil Rights Act Of 1964, 42 U.S.C. § 1981 and 1983, The Fifth, Thirteenth And Fourteenth Amendments To The U.S. Constitution.**

The affidavit of Charles Jones, Suzanne E. Woodard, Intervenor rule 24, Pleading (App. L, 34a) as well as the memorandum and argument before the Court below raised the racial and sexual discrimination issues. The failure of the Court below to follow the dictate of Congress to preserve prior rights resulted in the loss of jobs of the black, Hispanic and female employees hired pursuant to the affirmative action programs.²

Implementation of the new seniority system would leave a completely male work force and would eliminate virtually all of the minority employees hired pursuant to affirmative action programs. Of the minority men who will remain (only a few) they will be deprived of their prior seniority rights and will thereby stand at the bottom of the seniority list. For any and all seniority purposes they will be second class employees.

The abolition of prior rights results in state and federally induced *de facto* sexual and racial discrimination in violation of the Constitution and Civil Rights Act. Certiorari ought be granted.

² The proceeding below afforded no opportunity for proof or cross examination other than the presentation of affidavits and exhibits. The weighty issues presented to the three judge court below were finally decided on papers alone.

CONCLUSION

The decision below is in direct conflict with decisions of this Court that plain and unambiguous Congressional language must be given effect. It concerns the fundamental question of the freedom of Congress to state what it means free from judicial, state and Presidential Board interference. It concerns state, judicial and Presidential Board implementation of and/or concurrence in an unconstitutional seniority system. A writ of certiorari should issue to review the order, judgment and, if issued, the opinion of the Special Court.

Respectfully submitted,

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Dated: January 10, 1983

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APPENDIX A

Opinion Below

Not rendered as of this printing.

APPENDIX B

ORDER BELOW

**SPECIAL COURT REGIONAL RAIL
REORGANIZATION ACT OF 1973**

UNITED TRANSPORTATION UNION,

Petitioner,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,
NEW JERSEY RAIL OPERATIONS, INC.,

Respondents,

and

CONSOLIDATED RAIL CORPORATION

and

UNITED TRANSPORTATION UNION, GENERAL
COMMITTEE OF ADJUSTMENT, CONRAIL NORTH,

Intervenor.

§ 1152 Panel

C.A. No. 82-25

**ORDER DENYING MOTION OF PETITIONER UNITED
TRANSPORTATION UNION FOR A PRELIMINARY
INJUNCTION**

Oral argument on an expedited determination of paragraph 18(a) of the petition and on the motion of petitioner United Transportation Union ("UTU") for a preliminary injunction was heard in open court on December 17, 1982. Upon consideration of the record before us, including the entire record established before Neutral Referee Richard R. Kasher and filed with the Court in *New Jersey Transit Rail Operations, Inc. v. International Brotherhood of Boilermakers, et al.*, Civil Action No. 82-23 (November 5, 1982) ("NJT"), the arguments made and the papers filed by the parties, we have determined that a preliminary injunction should not be issued.

The standards for the issuance of a preliminary injunction enunciated in *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) were adopted by this court in *Trustees of the Property of the Penn Central Transportation Company v. Consolidated Rail Corporation*, 421 F. Supp. 1055, 1060 (1976). Those standards are: probability of success on the merits; irreparable injury to the proponent; harm to other interested parties; and the public interest.

In order to prevail on the merits, petitioner must prove that the provisions of Referee Kasher's award and implementing agreement complained of in paragraph 18(a) of the petition are beyond the scope of a neutral referee's jurisdiction under § 508 of the Rail Passenger Service Act (RPSA) as that act was amended by § 1145 of the Northeast Rail Service Act of 1981 (NRSA), 95 Stat. 357, 669. As we have stated in two previous cases, the petitioner must meet a heavy burden of proof before it can succeed in setting aside a referee's award. *NJT, supra*, and *American Railroad and Airway Supervisors Association, et al. v. Southeastern Pennsylvania Transportation Authority and Consolidated Rail Corporation*, Civil Action No. 82-24 (November 30, 1982). We have heard argument on the merits of paragraph 18(a), and, for the reasons to be fully set forth in our decision on those merits, petitioner has not met that burden. We are further convinced that the public interest would not be served by any delay or disruption in the orderly transfer of employees from Consolidated Rail Corporation to New Jersey Transit Rail Operations, Inc. by January 1, 1983, as mandated by § 508(c)(6) of RPSA. Accordingly,

IT IS ORDERED that the motion of the petitioner UTU for a preliminary injunction be, and the same hereby is, denied.

/s/ Oliver Gasch
OLIVER GASCH
Presiding Judge

/s/ William B. Bryant
WILLIAM B. BRYANT
Judge

/s/ Charles R. Weiner
CHARLES R. WEINER
Judge

December 21, 1982

**SPECIAL COURT REGIONAL RAIL
REORGANIZATION ACT OF 1973**

UNITED TRANSPORTATION UNION,

Petitioner,

v.

**METRO-NORTH (COMMUTER RAIL DIVISION
OF THE METROPOLITAN TRANSPORTATION AUTHORITY)**

and

CONSOLIDATED RAIL CORPORATION,

Respondents.

**§ 1152 Panel
C.A. No. 82-25**

ORDER

Upon consideration of the petition for review of petitioner United Transportation Union, the responses and objections thereto of respondents, the arguments of counsel in open court, the entire record herein, and for the reasons set forth in the memorandum to be issued herein, it is by the Court this 21st day of December, 1982,

ORDERED that the petition for review of the award of Neutral Referee Fred Blackwell of petitioner United Transportation Union be, and hereby is, dismissed with prejudice.

/s/ Oliver Gasch
OLIVER GASCH
Presiding Judge

/s/ William B. Bryant
WILLIAM B. BRYANT
Judge

/s/ Charles R. Weiner
CHARLES R. WEINER
Judge

6a

APPENDIX C

Judgment Below

Not rendered as of this printing

APPENDIX D**Northeast Rail Service Act Of 1981 § 1152, Subtitle E Of The
Omnibus Budget Reconciliation Act Of 1981, Pub. L. 97-35, 95
Stat. 676**

SEC. 1152. (a) Notwithstanding any other provision of law, the special court shall have original and exclusive jurisdiction over any civil action—

(1) for injunctive, declaratory, or other relief relating to the enforcement, operation, execution, or interpretation of any provision of or amendment made by this subtitle, or administrative action taken thereunder to the extent such action is subject to judicial review;

(2) challenging the constitutionality of any provision of or amendment made by this subtitle;

(3) to obtain, inspect, copy, or review any document in the possession or control of the Secretary, Conrail, the United States Railway Association, or Amtrak that would be discoverable in litigation under any provision of or amendment made by this subtitle; or

(4) seeking judgment upon any claim against the United States founded upon the Constitution and resulting from the operation of any provision of or amendment made by this subtitle.

(b) A judgment of the special court in any action referred to in this section shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States, except that any order or judgment enjoining the enforcement, or declaring or determining the unconstitutionality or invalidity, of any provision of this subtitle shall be reviewable by direct appeal to the Supreme Court of the United States. Such review is exclusive and any petition or appeal shall be filed not more than 20 days after entry of such order or judgment.

(c) Administrative action under the provisions of or amendments made by this subtitle which is subject to review shall be upheld unless such action is found to be unlawful under standards established for review of informal agency action under paragraphs (2)(A), (B), (C), and (D) of section 706, title

5, United States Code. The requirements of this subtitle shall constitute the exclusive procedures required by law for such administrative action.

(d) If the volume of civil actions under subsection (a) of this section so requires, the United States Railway Association shall apply to the judicial panel on multi-district litigation authorized by section 1407 of title 28, United States Code, for the assignment of additional judges to the special court. Within 30 days after the date of such application, the panel shall assign to the special court such additional judges as may be necessary to exercise the jurisdiction described in subsection (a) of this section.

APPENDIX E

Rail Passenger Service Act § 508, As Added By The Northeast Rail Service Act Of 1981, Subtitle E Of The Omnibus Budget Reconciliation Act Of 1981, Pub. L. 97-35, § 1145, 95 Stat. 669

“(a) Not later than May 1, 1982, Conrail, commuter authorities that intend to operate commuter service, and representatives of the various crafts or classes of employees of Conrail to be transferred to the commuter authorities shall enter into negotiations for an implementing agreement in accordance with subsection (c) of this section.

“(b) Not later than May 1, 1982, Conrail, Amtrak Commuter, and representatives of the various crafts or classes of employees of Conrail to be transferred to Amtrak Commuter shall enter into negotiations for an implementing agreement in accordance with subsection (c) of this section.

“(c) Such negotiations shall—

“(1) determine the number of employees to be transferred to Amtrak Commuter or a commuter authority;

“(2) identify the specific employees of Conrail to whom Amtrak Commuter or a commuter authority offers employment;

“(3) determine the procedure by which such employees may elect to accept employment with Amtrak Commuter or a commuter authority;

“(4) determine the procedure for acceptance of such employees into employment with Amtrak Commuter or a commuter authority;

“(5) determine the procedure for determining the seniority of such employees in their respective crafts or classes in Amtrak Commuter or with a commuter authority which shall, to the extent possible, preserve their prior seniority rights;

“(6) ensure that all such employees are transferred to Amtrak Commuter or a commuter authority no later than January 1, 1983; and

"(7) ensure the retention of prior seniority on Conrail of employees transferring to Amtrak Commuter or a commuter authority and determine the extent and manner in which such employees shall be permitted to exercise such seniority in order to (A) provide employees transferred to Amtrak Commuter or a commuter authority at least one opportunity every six-month period to exercise previous freight seniority rights, (B) maximize employment opportunities for employees on furlough, (C) maintain the ability to recall experienced employees, (D) ensure that under no circumstances are seniority rights exercised in any manner which results in any disruption of service or a position being filled which would otherwise not be filled under the terms of any crew consist, fireman manning or other similar agreement, and (E) ensure that Conrail has the right to furlough one employee in the same craft or class for each employee who returns from Amtrak Commuter or a commuter authority by exercising seniority.

"(d)(1) If agreements with respect to the matters being negotiated pursuant to this section are not reached by August 1, 1982, the parties to the negotiations shall, within an addition 5 days, select a neutral referee. If the parties are unable to agree upon the selection of such a referee, the National Mediation Board shall immediately appoint a referee.

"(2) The referee shall commence hearings on the matters being negotiated pursuant to this section not later than 5 days after the date he is selected or appointed, and shall render a decision within 20 days after the date of commencement of such hearings. All parties may participate in the hearings, but the referee shall have the only vote.

"(3) The referee shall resolve and decide all matters in dispute with respect to the negotiations of the implementing agreement or agreements. The referee's decision shall be final and binding to the same extent as an award of an adjustment board under section 3 of the Railway Labor Act, and shall constitute the implementing agreement or agreements between the parties. The National Mediation Board shall fix and pay the compensation of such referees.

"(e) If Amtrak Commuter transfers commuter service and properties to a commuter authority under section 506 of this title, Amtrak Commuter, the commuter authority, and representatives of the various crafts or classes of employees to be transferred to the commuter authority shall enter into an implementing agreement in accordance with subsection (c) of this section. If no agreement is reached by the date service and properties are transferred, the dispute shall be resolved by a neutral referee in accordance with subsection (d) of this section.

"(f) Any employee of Conrail who is not offered employment with Amtrak Commuter or a commuter authority under agreements entered into under this section shall be provided employee protection under section 701 of the Regional Rail Reorganization Act of 1973 to the same extent as if such employee had remained in the employ of Conrail.

APPENDIX F

Portions Of Kasher Award Of 10/14/82

AWARD

**IMPLEMENTING AGREEMENT BETWEEN THE
EMPLOYEES REPRESENTED BY THE UNITED
TRANSPORTATION UNION (UTU-T), NEW JERSEY
TRANSIT RAIL OPERATIONS (NJTRO) AND
CONSOLIDATED RAIL CORPORATION (CONRAIL)
PURSUANT TO SECTION 1145 OF THE NORTHEAST RAIL
SERVICE ACT OF 1981 AWARDED THIS 14TH DAY OF
OCTOBER 1982**

I. Number Of Employees To Be Transferred

A. The number of train service employees on the NJTRO train service Seniority Roster will be equal to the number of positions, regular and extra, engaged in the operation of commuter trains and other train service assignments supporting such operations within the NJTRO territory as of August 1, 1982.

B. The number of NJTRO train service positions advertised for bid and award will be equal to the number of positions, regular and extra, engaged in the operation of commuter trains and other train service supporting commuter operations within the NJTRO region as of October 1, 1982. These positions will be discontinued on Conrail and transferred to NJTRO effective January 1, 1983.

II. Transfer Of Employees

A. A special advertising bulletin will be posted on Conrail advising qualified train service employees of their right to indicate interest in obtaining employment with NJTRO. Such bulletin will be posted from October 18, 1982 to October 28, 1982.

F. Vacancies which occur after the awards are made under Article III.A. and before December 20, 1982 shall be advertised to Conrail employees on the Order Selection List who

were unsuccessful applicants, and if vacancies still remain, in accordance with the applicable Conrail collective bargaining agreement. All such advertisements shall contain the statement contained in Article III.C.

IV. Seniority

A. There will be a single NJTRO Seniority District for train service employees effective January 1, 1983 and the standing of employees on the NJTRO Seniority Roster shall be in accordance with the Order Selection List provided for in Article II.B. Standing on the Order Selection List will be the only standard of seniority on NJTRO for Conrail employees and, except for the standing on the Order Selection List, prior rights will not be applicable after January 1, 1983.

B. Employees hired by NJTRO after January 1, 1983 will establish seniority in accordance with the applicable NJTRO agreement governing rates of pay and working conditions.

V. Retention Of Conrail Seniority

A. Employees transferred to NJTRO pursuant to Article II above shall retain and continue to accumulate seniority on Conrail but shall only be entitled to exercise such seniority under the following circumstances:

C. Employees will be placed on the Order Selection List on the basis of their prior prior or prior right seniority. In the event there are insufficient applications from employees with prior prior rights to fill the allocated numbers for any of the Penn Central prior prior right districts, the remaining employees below the last prior prior right employee of that district will be drawn from prior right Penn Central employees and placed on the Order Selection List on the basis of their prior right Penn Central roster standing. Vacancies remaining on the Order Selection List, following the exercise of prior prior and prior rights, will be filled with applicants from the District "G" train service roster on the basis of their Conrail seniority.

D. Once train service employees have been placed on the Order Selection List in accordance with the foregoing principles, the standing of such employees for the purpose of bidding assignments with NJTRO shall be determined on the basis of their earliest retained seniority dates as trainmen with Conrail or a Conrail predecessor railroad. Such employees' prior prior or prior rights on Conrail are not disturbed by this Award.

APPENDIX G

Portions Of The Complaint

**SPECIAL COURT REGIONAL
RAIL REORGANIZATION ACT OF 1973 SECTION 1153**

UNITED TRANSPORTATION UNION,
Petitioner,

v.

**SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,
NEW JERSEY RAIL OPERATIONS, INC.,**
Respondents

**and
CONSOLIDATED RAIL CORPORATION**
Rule 19 Party

Civil Action NO. 82-25

**FILED NOV 12 1982
JAMES F. DAVEY
CLERK
p.m.**

**PETITION OF UNITED TRANSPORTATION UNION FOR
REVIEW OF AWARD OF NEUTRAL REFEREES FRANCIS
X. QUINN, RICHARD R. KASHER, AND FRED
BLACKWELL ISSUED PURSUANT TO SECTION 508 OF
THE RAIL PASSENGER SERVICE ACT AS AMENDED BY
THE NORTHEAST RAIL SERVICE ACT OF 1981 (NERSA)**

PRELIMINARY STATEMENT

This action is brought pursuant to Section 508(d)(3) of the Rail Passenger Service Act [hereinafter, "RPSA"] which provides that awards of implementing agreements made by neutral referees appointed thereunder are final and binding to the same extent as awards of adjustment boards under Section 3 of the Railway Labor Act (45 U.S.C. § 153).

* * *

COUNT II
AS TO NJT

17. Petitioner realleges and incorporates herein by reference all preceding allegations of this Complaint.

18. The seniority provisions of the Kasher Award and Implementing Agreement are beyond the scope of the neutral referee's jurisdiction under Section 508 of RPSA in that they:

(a) Created a Limited Order Selection List of UTU employees only for the initial purpose of going over to NJT. Once over, all prior seniority rights end and, contrary to Section 510, establishes a new type seniority system (dove tailed company-wide seniority). The Kasher award changes the seniority from job run to company run seniority, drastically changing and affecting the seniority of all transferring personnel in contradiction to the intent of NERSA. The award specifically directs that seniority prior rights will not be applicable after January 1, 1983;

(b) Eliminate the prior seniority right of the employees to ebb and flow between NJT passenger and Conrail freight service;

(c) Terminate all NJT seniority for some employees returning to Conrail.

All specifically prohibited and contraindicated by the Congress in Section 508(c)(5) and (7) of the RPSA, which subsections indicate that implementing agreements should protect prior seniority "to the extent possible" (5), and should insure the protection of prior seniority rights (7).

APPENDIX H
REPORT TO THE PRESIDENT
SELECTION OF FINAL OFFERS
BY
EMERGENCY BOARD
NO. 197

**APPOINTED BY EXECUTIVE ORDER 12385 DATED
OCTOBER 1, 1982, PURSUANT TO SECTION 510 OF THE
RAIL PASSENGER SERVICE ACT, AS AMENDED BY THE
NORTHEAST RAIL SERVICE ACT OF 1981**

**To Investigate The Dispute Between New Jersey Transit Rail
Operations, Inc. And Certain Labor Organizations.**

WASHINGTON, D.C.
DECEMBER 1, 1982

V. SELECTION OF FINAL OFFERS

When the Board reviewed the final offers, it was apparent that certain of our concerns as well as our hopes had been realized. Although a number of parties had moderated, reconstructed and reduced their initial proposals, generally following the guidance in our November 1, 1982 Report, other parties had held firm and "resubmitted" their first contract offers. In fairness, we should observe that these parties stated that they had not moved from their initial positions as they had not received counter offers to their original proposals, and they believed that "it was not their turn to move."

In any event, the final offer selection process did not bring the parties' positions as close together as labor relations theorists would have hoped. Additionally, as the final offers included the entire gamut of rates of pay, rules and working conditions for each craft or class of employees, this Board is hard-pressed to conclude that any of the offers, in the context of real world

collective bargaining, are truly reasonable. However, the statutory mandate requires that we select the "most reasonable" offers and we shall do so.

Accordingly, the Board has selected the final offers of NJTRO as the "most reasonable."

The Board, however, wishes to point out that it was troubled in its selection of the NJTRO final offers vis-a-vis the final offers of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC), in view of the extreme nature of NJTRO's proposal regarding the number of fully and partially excepted positions, the high percentage of part-time employees, and the exorbitant reduction in current rates. Therefore, although the Board has selected NJTRO's final offers vis-a-vis BRAC, we expect that future negotiations will result in meaningful modifications by NJTRO concerning the above-mentioned issues.

It is the Board's view that our selection of these final offers does not represent the culmination of the bargaining process, but does create a new environment for continued, constructive negotiations. We are convinced that both NJTRO and the rail unions are mutually dedicated to the continuity of efficient and productive commuter service for the benefit of the citizens of New Jersey. We are also convinced, based upon our knowledge of negotiations which have been conducted subsequent to the submission of final offers, that the parties are bargaining in good faith, that their final offers are not their "final positions", and that additional concessions should and must be made by both sides. The Board would suggest, in view of the little time remaining before the January 1, 1983, transfer of commuter service to NJTRO, that the parties attempt to rapidly reach agreements in principle. In these circumstances, the Board will remain available to assist the parties in a mediatory capacity in future negotiations, in the event our presence is mutually requested.

FINAL OFFER

Made By

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.

To

THE UNITED TRANSPORTATION UNION

Dated

NOVEMBER 16, 1982

* * *

RULE 6. TIME TO EAT

Trainmen and conductors in other than passenger service shall be allowed 20 minutes for lunch without deduction in pay. The lunch period must be given and completed from the period between 4-1/2 to 6 hours after starting work.

SENIORITY RULES

RULE 1. SENIORITY

(a) The seniority date for each employee shall be his date of hire with NJT Rail, provided that employees transferred from the Consolidated Rail Corporation pursuant to the Implementing Agreement to which NJT Rail and the Union are signatory shall have a seniority date and rank as provided for in that Implementing Agreement. In the event that more than one (1) new hire occurs on the same date, the standing on the seniority roster shall be determined with respect to that date in the order of the date and time of an employee's prehire physical.

(b) The seniority established under this Agreement will be the date an employee first holds a job title within such class with NJT Rail, provided that employees transferred from the Consolidated Rail Corporation

APPENDIX I

Kasher Decision Of 12/6/82

Telegram to:

C.D. Jones, General Chairman UTU

Robbins, NJTRO

L.W. Swert, General Chairman, UTU

R.E. Swert, Vice President Labor Relations, Conrail

By letter dated November 1, 1982, UTU General Chairman C.D. Jones requested NJTRO, Inc. and Conrail Corporation to join with him in requesting me as neutral referee to render an interpretation of allegedly unclear Article IV A, X D in the Implementing Agreement Award I issued on 10/14/82 involving NJTRO, Conrail and the United Transportation (T).

After notifying all interested parties, a clarification plan interpretation hearing was conducted before the Neutral Referee on Friday, December 3, 1982 in Philadelphia, Pa.

The parties were afforded full opportunity to raise all relevant arguments in support of their respective positions.

The essence of the claim of ambiguity in the Award raised by the General Committee of General Chairman Jones is that Article IV A seniority which establishes a single NJTRO seniority district for train service employees, speaks in terms of standing from the order selection list as being the "only standard seniority" on NJTRO, while Article X D states that once the order selection list has been filled by prior right equity member employees on the list will have their seniority determined on the basis of their earliest respective authority with Conrail or that predecessor carrier.

It is conceded that reading these two excerpts from Articles IV and X alone might arguably create an ambiguity. However, a plain language of the opinion, Page 14, which was issued contemporaneously with the Implementing Agreement Award establishes that the prior right concept was used only for the

"creation" of the Order Selection list (seniority roster) and that once the list/roster has been created the concept of date of hire will be used for normal and customary seniority purposes.

Accordingly we reaffirm here our previous holding that prior rights will be preserved "to the extent possible" by using that concept for purposes of determining the appropriate percentage of employees who will compromise the Order Selection List/seniority roster as of 1/1/83 and that once the percentages are established by prior right principles, date of hire principles will apply for seniority purposes when NJTRO begins operations on 1/1/83.

The General Committee of General Chairman Jones raised several equitable arguments for our review at the 12/3/82 clarification hearing which have been considered. The neutral referee is not persuaded to change the award after hearing these equitable arguments for two reasons, first, the argument stage of the Section 508 proceeding concluded on 10/8/82 and our present jurisdiction, absent an extension of such by all interested parties, is limited to interpreting or clarification existing awards only. Secondly, there are equitable arguments that establish with equal force, in our view, which support the date of hire principle proposed by the General Committee of the UTU, General Chairman L.W. Swert. The implementing agreement award of 10/14/82 was based upon legal, equitable and practical considerations and reconsideration here is not, in our view, appropriate.

Clarification by
Richard R. Kasher, Neutral Referee

APPENDIX J

Affidavit Of Charles P. Jones

**SPECIAL COURT REGIONAL
RAIL REORGANIZATION ACT OF 1973**

UNITED TRANSPORTATION UNION,

Petitioner,

v.

**SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,
NEW JERSEY RAIL OPERATIONS, INC.,**

Respondents,

and

CONSOLIDATED RAIL CORPORATION

Rule 19 Party

Civil Action No.

C.A. 82-25

**STATE OF PENNSYLVANIA)
COUNTY OF PHILADELPHIA) ss:**

CHARLES P. JONES, being duly sworn, says:

I am the General Chairman of the United Transportation Union [hereinafter, "UTU"] and represent many of the operating crews of trains presently operated by Consolidated Rail Corporation [hereinafter, "Conrail"], which trains are being taken over by New Jersey Transit Rail Operations, Inc. [hereinafter, "NJT"], as of January 1, 1983, pursuant to the National Rail Service Act of 1981 [hereinafter, "NERSA"].

I incorporate by reference and adopt herein the facts contained in the Complaint in the within action as well as the exhibits annexed thereto.

I make this affidavit in support of a cross-motion for preliminary injunction which seeks to prevent NJT from implement-

ing that part of the Kasher award which changes seniority rights from a prior rights seniority system, also known as the "G" Roster seniority system, illustrated by Exhibit A annexed hereto, which currently exists as the Conrail seniority list, to a new and different NJT seniority system based upon a company-wide date of hire seniority.

THE EXISTING SENIORITY

The current seniority system as illustrated by Exhibit A has existed and been applied by Conrail, its predecessor companies and the union for more than 25 years. It has existed in its present form since April 1, 1976, the date on which Conrail came into existence, and has been the day-to-day seniority list for all UTU Conrail employees for the last 6½ years.

The present Conrail seniority list, like all seniority lists, is partially based upon the date of hire of the employee. The "G" roster seniority list, in addition gives to each employee a territorial seniority, that is, a seniority based upon the particular railroad he originally hired upon. Thus, an employee who originally hired on the Erie Railroad has an Erie Railroad seniority as well as a Conrail-wide seniority.

As to the employee's original territory or railroad, the employee's seniority date is superior to all other employees of Conrail employed in other territories, irrespective of the other employee's date of hire.*

*This territorial seniority is referred to as his *prior right seniority* if it goes back before the Conrail merger. It is known as *prior prior right* seniority if it goes back through two mergers. The Pennsylvania Railroad merger with the Central Railroad in 1968 and became the Penn Central Railroad. On April 1, 1976, the Penn Central Railroad merged with numerous other railroads and became Conrail. Thus, an employee hiring on Conrail in 1980 would have only Conrail

To illustrate, a 25-year former Erie employee would be superior in seniority *on the Erie territory* to a 30-year former Pennsylvania Railroad employee. The same 30-year former Pennsylvania Railroad employee would be superior in seniority *on the Pennsylvania territory* to a 35-year former Jersey Central Railroad employee. However, if the 25-year Erie employee were competing with the 30-year former Pennsylvania Railroad employee for a position on the *Reading territory* (an area not involving either of their mother territories), then the earlier date of hire would govern seniority as between them.

An employee's prior and prior prior rights were well understood by the companies, the unions and the personnel. With each merger over the past four decades, prior and prior prior seniority rights were negotiated, protected, and carried on by the succeeding railroads.

PRIOR AND PRIOR PRIOR RIGHT SENIORITY, A RAILROAD TRADITION CONTINUED BY NERSA

During this century and up to the present time, all prior and prior prior rights have been protected by Congress, the railroads, the unions, and the employees during many railroad mergers in the Northeast. Congress, in enacting Section 508 clearly indicated that the implementing agreements or awards should protect seniority "to the extent possible," § 508(C)(5) and should insure the protection of prior seniority rights § 508(C)(7). It is clearly "possible" to implement the prior and prior right seniority rights of the UTU Conrail employees as they go over to NJT. Such carry over of prior and prior prior

seniority. An employee hiring on the Penn Central in 1970 would have Conrail seniority and *prior right* seniority, i.e., seniority on the former Penn Central Railroad. An employee who hired on the Pennsylvania Railroad in 1960 would have Conrail seniority. Penn Central seniority (*prior right seniority*) and Pennsylvania Railroad seniority (*prior prior right seniority*).

rights of UTU employees has been accomplished with simplicity in the following examples:

The implementing agreement entered into at the time of the creation of Conrail from predecessor railroads, between Conrail and the UTU dated July 23, 1974, annexed to the Complaint as Exhibit I;

The agreement just signed between Amtrak, Conrail, and the UTU dated November 8, 1982, annexed to the Complaint as Exhibit J; and

The implementing agreements of the authorities named herein insofar as they permit the UTU employees to bid into jobs on the new authorities according to their prior right seniority, Exhibits F, G, and H annexed to the Complaint.

As another example, the other northeast corridor implementing awards of Referees Quinn and Blackwell previously before the Court have preserved to a great extent the prior and prior prior rights of the UTU employees. They do not provide for the new dove-tail type seniority as contained in the Kashwer award.

THE KASHER AWARD CHANGED TRADITIONAL PRIOR AND PRIOR PRIOR RIGHT SENIORITY TO A COMPANY-WIDE DOVE-TAILED SENIORITY

In the Kasher award, which was for purposes of establishing an implementing agreement under Section 508 (Exhibit G annexed to the Complaint), Mr. Kasher attempted to establish an order selection list which to a very limited extent sought to protect prior and prior prior rights - Article 10 C.

"Article 4 SENIORITY

A. There will be a single NJTRO Seniority District for train service employees effective January 1, 1983 and the standing of employees on the NJTRO Seniority Roster shall be in accordance with the Order Selection List provided for in 11 B. Standing on the Order Selection List will be the only standard of seniority on NJTRO for Conrail employees and, except for the standing on the Order

Selection List, prior rights will not be applicable after January 1, 1983."

Had he stopped at this point, the prior and prior prior seniority rights of the Conrail UTU members would have been preserved to some extent. However, not content with getting the employees over to NJT (we contend his only proper function), the Implement Agreement Award continued and we contend, beyond the scope of the 508 authority and into the scope of the 510 agreement over which Mr. Kasher had no jurisdiction. Mr. Kasher continued in Article 10D:

"Once train service employees have been placed on the Order Selection List in accordance with the foregoing principles, the standing of such employees for the purpose of bidding assignments with NJTRO shall be determined on the basis of their earliest retained seniority dates as trainmen with Conrail or a Conrail predecessor railroad. Such employees' prior prior or prior rights on Conrail are not disturbed by this Award."

Confused by the language and apparent contradiction between 4A, 10C, and 10D of the Kasher Implementing Award, I requested a clarification meeting with all parties before Referee Kasher. This conference was held on Friday, December 3, 1983, at which all parties appeared and participated. (See unofficial minutes annexed hereto as Exhibit C.) I represent those minutes as a substantially accurate summary of what occurred.

On Monday, December 6, 1982, Mr. Kasher issued his decision (Exhibit D) refusing to limit his decision to a 508 interim agreement only. He asserted that prior and prior prior rights would be applicable only for purposes of going over to NJT and once over the employee's seniority would be based on company-wide, date-of-hire seniority. After January 1, 1983, there would be no further prior and prior prior seniority rights.

CONSEQUENCES OF THE KASHER SENIORITY PROVISION. REASONS FOR THE INJUNCTION

STATUTORY CONSEQUENCES

The implementation of the Kasher seniority provision would directly contravene and thwart the Congressional intent and clear language of the enabling statute. The enabling statute clearly provided, 508 C 5 and 7 of the RPSA, that the implementing agreement should protect prior seniority "to the extent possible" (5), and should insure the protection of prior rights (7). to permit Referee Kasher to dictate a whole new seniority scheme would violate the clear language of the enabling statute, would end all prior and prior prior seniority rights, and further would be beyond his jurisdiction in that it would establish a permanent 510 provision concerning ongoing seniority.

CONSEQUENCES TO THE NON-MINORITY EMPLOYEES

Annexed hereto as Exhibit B is the Order Selection List published this week according to the original bids of the Conrail employees onto NJT. According to this exhibit, only employees hired before February 18, 1965, are on the NJT Order Selection List. Thus, employees who do not make the final Order Selection List will immediately be subject to paragraph D of Kasher Award which will permit the indiscriminating, territorial bumping among these employees for assignment, rather than continuing their regular territorial assignment. These 610 employees will be scrambling for positions throughout the new employer's organization as soon as they have been finally selected by the final selection date of December 22, 1982. These so-called "lucky" employees will not move over in a sensible, orderly fashion of merely having a new employer take over an existing railroad, but rather will be scrambling for employment. They will be working on shifts unfamiliar to them, in unfamiliar territories, in areas long distances from their homes.

If this Court were to continue the Seniority G list until the 510 agreement is finally negotiated, all this demoralizing and traumatic confusion to the employees would not take place. This Court is urged to keep the G roster with which all parties are familiar rather than implementing the Kasher Award which proscribes dove-tailed day-of-hire seniority for all purposes of job assignment.

The legislation, this Court, the companies, unions involved, and their lawyers have all been blind sided. Some how the concept of a new company being formed and employees going over to the new company has universally pervaded our approach be we lawyer, union leader, company manager, referee, or, respectfully, judge of the Court.

It is not the employees who are going over to a new company. The jobs are the same, the employees are the same, and the trains and passengers are the same. It is only the company that is new—that is going over. The company, NJT, should go over to the existing railroad and railroad employees in the language of the Kasher award with as little disruption as possible.

Conrail in requesting an expedited decision, has urged that it not be placed in the position of unscrambling the seniority egg. The seniority of Roster G should continue until a new 510 contract is negotiated and in place. The consequences of the Kasher Award should be stayed now. The time to unscramble the egg is before it is pushed off the wall.

AS TO THE MINORITY EMPLOYEES

The Court will note that pursuant to the Order Selection List of NJT (Exhibit B), there are no employees having a date of hire later than February 18, 1965, on that list. Coincidentally, it was not until the later 1960s that Pennsylvania Railroad and the Central Railroad began a major effort to implement affirmative action programs. From a period beginning in 1967, the railroads began to add women to their operating train personnel. Prior to that time, of the 7,000 people on the G roster, there were only two women train personnel. Those two

have since retired. Subsequent to 1967, pursuant to the affirmative action programs, approximately 200 blacks and hispanics have been added as employees of the train operating personnel of the UTU. Many women have been added. Implementation of the Kasher award, as currently proposed, would leave a completely male work force and would eliminate virtually all of the black and hispanic employees hired pursuant to the affirmative action programs. Of the minority men who will be remaining (I believe less than five), they will be deprived of their prior and prior prior seniority and will thereby stand at the bottom of the list as to the selection of positions on the railroad. For any and all seniority purposes, they will be second class employees. Such a throw back in history ought not be permitted.

The discrimination consequences of the Kasher award were pointed out to him in the argument clarification of December 3, 1982. He did not comment upon the argument in his reconsideration award (Exhibit D).

If this court enjoins the implementation of the Kasher award as to seniority, the Hispanic, black, and female employees will continue with their earned prior right territorial seniority and the *de facto* discrimination will not take place. Such an order of injunction should be issued by this Court.

WHEREFORE, deponent prays that this Court enter an order enjoining the NJT, its officers, assigns, agents, employees, and contractors from changing the seniority order, the G roster, of the UTU as it presently exists on Conrail and, further enjoining the abolition of prior rights, and the

establishment of a new type of date-of-hire seniority as enunciated by Referee Kasher.

/s/ Charles P. Jones
CHARLES P. JONES

Subscribed and sworn to before me
this 9th day of December, 1982.

/s/ Donna Marie Collins
Notary Public

My Commission Expires:
November 28, 1983

APPENDIX K

Affidavit Of Suzanne E. Woodard

**SPECIAL COURT REGIONAL
RAIL REORGANIZATION ACT OF 1973**

UNITED TRANSPORTATION UNION,
Petitioner,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,
NEW JERSEY RAIL OPERATIONS, INC.,
Respondents,

and

CONSOLIDATED RAIL CORPORATION
Rule 19 Party

SUZANNE E. WOODARD, and
others similarly situated,
Intervenors.

**Civil Action No.
C.A. 82-25**

**STATE OF NEW JERSEY:
COUNTY OF ESSEX: ss:**

AFFIDAVIT OF SUZANNE E. WOODARD

SUZANNE E. WOODARD, being duly sworn, deposes and says:

1. I am a black woman who is currently a passenger conductor/trainman for the Consolidated Rail Corporation (hereinafter "Conrail"). I was hired on October 5, 1977.

2. Upon information and belief, a number of contracts including those covered by Executive Order 11246 required Conrail to engage in affirmative action for employment of operat-

ing crews; my employment and the employment of others was effectuated pursuant to those plans.

2. Prior to 1977, only two women were employed by Conrail on train routes to be assumed by New Jersey Rail Operators, Inc. (hereinafter "NJT") as of January 1, 1983, as passenger conductors/trainmen on a continuing basis. They are no longer Conrail employees.

3. Upon information and belief, approximately 95-100 blacks were hired in 1977-78 by Conrail on train routes to be assumed by NJT as passenger conductors/trainmen, a large number of whom are currently so employed.

4. Upon information and belief, seven women were hired by Conrail in 1977-78 on train routes to be assumed by NJT as passenger conductors/trainmen and these women are currently so employed.

5. Upon information and belief, there are between 800 and 1000 passenger conductors/trainmen who are employed by Conrail on train routes to be assumed by NJT.

6. Upon information and belief, there are a total of approximately 100 blacks employed as passenger conductor/trainmen on the train routes to be assumed by NJT.

7. Upon information and belief, there are a total of seven women employed as passenger conductors/trainmen on the train routes to be assumed by NJT.

8. I learned on or about the beginning of November that a system for calculating seniority has been proposed which would limit the employment of passenger conductors/trainmen at NJT to those who had been hired prior to 1956 in the case of former Penn Central Railroad employees, or to 1966 in the case of former employees of the Erie Lackawanna or C.N.J. railroads.

9. I learned that the present action by the United Transportation Union was to be filed by plaintiff on December 9, 1982, one day before it was actually filed.

10. Upon information and belief, NJT has opened 611 slots for passenger conductors/trainmen. If the proposed seniority system is adopted, NJT will retain only five black males and no women, and two Hispanic men employed as passenger conductor/trainmen.

11. Upon information and belief, Hispanics will be similarly adversely affected by the proposed seniority system.

12. Upon information and belief, no women or minorities affected by the proposed seniority plan have been offered other employment with NJT, the date for notification of employees so selected already having passed.

13. I have not been selected for the NJT roster, since my date of hire was subsequent to 1956. I will be unemployed as of January 1, 1983, with only the possibility of being recalled at a later date, if and when an opening on the roster should develop.

14. Upon information and belief, those women and minorities who are adversely affected by this proposed seniority system will be unemployed as of January 1, 1983, with only a speculative possibility of later recall.

15. I believe that if the seniority plan, as set forth, goes into effect, I will suffer discrimination based upon my race and sex.

/s/ Suzanne E. Woodard
SUZZANNE E. WOODARD

Subscribed and sworn to before me
this 16th day of December, 1982.

/s/ Paul Schacter—Attorney
State of New Jersey

APPENDIX L
PORTION OF INTERVENORS' COMPLAINT

SPECIAL COURT REGIONAL
RAIL REORGANIZATION ACT OF 1973

UNITED TRANSPORTATION UNION,
Petitioner,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,
NEW JERSEY RAIL OPERATIONS, INC.,
Respondents,

and

CONSOLIDATED RAIL CORPORATION
Rule 19 Party

and

SUZANNE E. WOODARD, *et al.*,
Intervenors.

Civil Action No.
C.A. 82-25

INTERVENORS' RULE 24 PLEADING

I. NATURE OF ACTION

1. Intervenors are non-white and women passenger conductors/trainmen currently working for Consolidated Rail Corporation (Conrail). This action is for violation of the civil rights of these employees whose jobs and rights will be eliminated by the ordered modification of seniority (G roster) in violation of Title VII of the Civil Rights Act of 1964, 42 USC Secs. 1981 and 1983, the Fifth, Thirteenth and Fourteenth Amendments to the U.S. Constitution and to their rights as third party beneficiaries to contracts made pursuant to Executive order 11246 between Conrail, New Jersey Transit Rail Operation, Inc. (NJT) and other governmental and private entities.

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

FILED

FEB 9 1983 p.m.

JAMES F. DAVEY, Clerk

UNITED TRANSPORTATION UNION,

Petitioner,

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY, NEW
JERSEY TRANSIT RAIL OPERATIONS,
INC.

Respondents,

and

CONSOLIDATED RAIL CORPORATION,

Rule 19 Party,

and

UNITED TRANSPORTATION UNION,
GENERAL COMMITTEE OF ADJUSTMENT,
CONRAIL NORTH; and SUZANNE E.
WOODARD, et al.,

Intervenors.

\$1152 Panel

C.A. No. 82-25

Joseph P. Altier, Esq. (Altier
Wayne & Klein, New York, NY), for
United Transportation Union

Alan J. Davis, Esq. and Mark L.
Alderman, Esq. (Wolf Block Schorr
& Solis-Cohen, Philadelphia, PA)
for Southeastern Pennsylvania
Transportation Authority

Kenneth S. Levy, Deputy Attorney
General, (Irwin I. Kimmelman,
Attorney General of the State of
New Jersey, Newark, NJ) for New
Jersey Transit Rail Operations,
Inc.

David S. Fortney, Esq. and Dennis Alan Arouca, Esq. (Consolidated Rail Corporation, Philadelphia, PA) and Harry A. Rissetto, Esq. and John A. Fraser, Esq. (Morgan Lewis & Bockius, Washington, D.C.) for Consolidated Rail Corporation

Norton N. Newborn, Esq. (Gaines & Stern, Cleveland, OH) for United Transportation Union, General Committee of Adjustment, Conrail North

Paul Schachter, Esq. (Paul Schachter, P.A., Newark, NJ) for Suzanne E. Woodard, et al.

Before GASCH, Presiding Judge, and BRYANT and WEINER, Judges.

MEMORANDUM OPINION

WEINER, Judge:

This action was brought by representatives of the United Transportation Union (UTU) on a petition for review of the separate awards of two arbitrators made pursuant to §508 of the Rail Passenger Service Act (RPSA) as amended by §1145 of the Northeast Rail Service Act of 1981 (NRSA), Pub. L. No. 97-35 (August 13, 1981), 95 Stat. 357, 669. 45 U.S.C. §588. In Count I the petitioners challenge the seniority provisions of the October 10, 1982 award and implementing agreement of Dr. Francis X. Quinn resulting from an arbitration proceeding among UTU, Southeastern Pennsylvania Transportation Authority (SEPTA) and Consolidated Rail Corporation (Conrail). Count II of the petition challenges the differing seniority provisions of the

October 14, 1982 award and implementing agreement of Mr. Richard R. Kasher resulting from an arbitration proceeding among UTU, New Jersey Transit Rail Operations, Inc. (NJT), and Conrail. Certain other aspects of the awards of these two neutral referees have been challenged in two previous cases before this Court. We dismissed a petition for review of Referee Kasher's award on other grounds in New Jersey Transit Rail Operations, Inc. v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; et al., 550 F. Supp. 1327 (Sp. Ct. R.R.R.A. 1982) (NJT v. IBB). A petition to review other provisions of Dr. Quinn's award was dismissed in American Railway & Airway Supervisors Association v. SEPTA and Conrail, 551 F. Supp. 688 (Sp. Ct. R.R.R.A. 1982) (ARASA v. SEPTA).

This case was initiated when a petition for review was filed on November 12, 1982. Fearing that the pendency of this action would adversely affect a scheduled December 22, 1982, awarding of NJT positions to Conrail train service employees, Conrail, on December 7, 1982, moved for an expedited determination of paragraph 18(a) of the petition. After an order to show cause was issued and no objection was received, the Court ordered that the merits of paragraph 18(a) of the petition for review be determined on an expedited schedule and set oral argument for December 17, 1982. On December 10, 1982, petitioner filed a "cross" motion for a preliminary injunction to require New Jersey Transit Rail Operations, Inc. (NJT) to utilize without any alteration the Conrail seniority district G roster in awarding all NJT positions. On the same date the United

Transportation Union, General Committee of Adjustment, Conrail North (intervenor UTU) moved to intervene as a party-respondent alleging that its members opposed the relief sought by petitioner UTU. At oral argument on December 17, 1982, no objection to the intervention of intervenor UTU was made and leave to intervene was granted from the bench.

We received a motion to intervene by twenty individual minority and female Conrail employees only minutes prior to convening the oral argument. At the argument, the Court announced that the individual employees' motion to intervene would be taken under advisement and would be decided after the parties had an opportunity to file papers in opposition to the motion. In response NJT filed its opposition and Conrail filed an opposition which it supplemented twice.

On December 21, 1982, one day before the scheduled awarding of positions with NJT, we denied petitioner's motion for a preliminary injunction. The standards for the issuance of a preliminary injunction found in Trustees of the Property of the Penn Central Transportation Company v. Consolidated Rail Corporation, 421 F. Supp. 1055, 1060 (Sp. Ct. R.R.R.A. 1976), were applied and it was determined that the public interest would be ill-served through the issuance of a preliminary injunction. We further found that petitioner failed to demonstrate a likelihood of success on the merits. Based upon the reasons stated herein, the Court rules that paragraph 18(a) of the petition should be dismissed.

BACKGROUND

This action was brought in the name of the UTU at the initiative of UTU General Committee of Adjustment, Conrail (PLE-T), one of approximately seventeen constituent UTU general committees representing Conrail employees and one of two general committees directly affected by the arbitration award of Mr. Kasher. UTU is a labor organization representing operating employees in the railroad industry. UTU represents both train service and engine service employees, although the dispute in this case involves only train service employees, i.e. conductors and trainmen. The employees represented by petitioner UTU are present Conrail employees who work on the rail lines formerly operated by the Penn Central Railroad. The majority of petitioner's members were formerly employed by Penn Central prior to April 1, 1976. Petitioner UTU represents 38.3% of Conrail train service employees affected by Mr. Kasher's award. Intervenor UTU represents present Conrail employees working on rail lines formerly operated by Erie Lackawanna Railway and Central Railroad of New Jersey (CNJ). Most of these employees were employed by the EL and CNJ prior to April 1, 1976. Intervenor represents the remaining 61.7% of Conrail train service employees affected by the Kasher award.

A complete discussion of the legal and factual background of the arbitration proceeding before Referee Kasher is contained in Judge Gasch's opinion in NJT v. IBB. In that prior

case UTU was served with the verified petition of NJT but failed to enter an appearance. The identity of and relationship between NJT and Conrail were also described in that case. 550 F. Supp. at 1328.¹ Familiarity with that opinion is assumed and we will augment the factual and legal discussion in NJT v. IBB only where necessary for clarity in this case.

During the arbitration proceedings before Referee Kasher, petitioner UTU was represented by its General Chairman, C.P. Jones, and intervenor UTU was represented by its General Chairman, L.W. Swert. Both General Chairmen made initial and reply submissions to Referee Kasher and participated in the arbitration proceeding. Being dissatisfied with Referee Kasher's award regarding the preservation of prior seniority rights, petitioner UTU requested a clarification of portions of the award. Subsequent to a conference held on December 3, 1982, Mr. Kasher issued a clarification of his award and implementing agreements by telegram on December 6, 1982 (Exhibit D to the affidavit of C.P. Jones).

Paragraph 18(a) of its petition alleges that provisions of the Kasher award and implementing agreement among UTU, NJT and Conrail are beyond the scope of a neutral referee's jurisdiction under §508 in that by establishing a company wide seniority

1. The record of the arbitration proceedings before Referee Kasher was delivered to the Court on October 21, 1982, by the National Mediation Board and filed in NJT v. IBB, Civil Action No. 82-23. The Court, in discussing the instant case, will refer to the submissions of the parties to the arbitration proceeding as found in that record.

roster the award does not preserve "prior" seniority rights to the extent possible as required by that section.²

The concept of prior seniority rights is a familiar one in the railroad industry. Under the existing Conrail seniority system, an employee may have seniority based on both his date of hire and the particular predecessor railroad employing him prior to the formation of Conrail on April 1, 1976. Seniority rights based on employment with Conrail's predecessor railroad are known as prior rights. An individual employee may also have "prior prior" rights if he was employed by a railroad which was absorbed or merged into one of Conrail's predecessor railroads. An example of the exercise of prior and prior prior seniority rights exists where a former Erie employee with twenty-five years seniority has greater seniority on a rail line formerly operated

2. The text of paragraph 18(a) is as follows:

18. The seniority provisions of the Kasher Award and Implementing Agreement are beyond the scope of the neutral referee's jurisdiction under Section 508 of RPSA in that they:

(a) Created a Limited Order Selection List of UTU employees only for the initial purpose of going over to NJT. Once over, all prior seniority rights end and, contrary to Section 510, establishes a new type seniority system (dove tailed company-wide seniority). The Kasher award changes the seniority from job run to company run seniority, drastically changing and affecting the seniority of all transferring personnel in contradiction to the intent of NERSA. The award specifically directs that seniority prior rights will not be applicable after January 1, 1983.

. . . specifically prohibited and contraindicated by the Congress in Section 508(c)(5) and (7) of the RPSA, which subsections indicate that implementing agreements should protect prior seniority "to the extent possible" (5), and should insure the protection of prior seniority rights (7).

by the Erie railroad than a former employee of the Pennsylvania Railroad with thirty years seniority. Likewise, a former Lackawanna employee with twenty years seniority by exercising his prior prior rights would have greater seniority on a former Lackawanna line than the employee with twenty-five years on a rail line formerly operated by the Erie Railroad.

In the proceedings before Referee Kasher, both petitioner and intervenor UTU agreed to the establishment of an "order selection list" utilizing prior and prior prior seniority rights.³ Petitioner recognizes that the Kasher award provides for the application of prior and prior prior rights of Conrail employees within Conrail's seniority district G for that purpose. The procedures for establishing the order selection list are found in Article X., paragraphs A to C, of Referee Kasher's implementing agreement which is reproduced in the

3. In its October 1 submission to Referee Kasher petitioner UTU proposed an implementing agreement. Article IV.A. of that agreement is as follows:

IV. SENIORITY

A. There will be a single NJTRO Seniority District for train service employees effective January 1, 1983 and the standing of employees on the NJTRO seniority roster shall be in accordance with the Order Selection List provided for in Paragraph I. The Order Selection List will be the only standard of seniority on NJTRO for Conrail employees and, except for the standing on the Order Selection List, prior rights will not be applicable after January 1, 1983.

The wording of Article IV of Referee Kasher's implementing agreement is almost identical to the wording submitted by petitioner UTU.

margin.⁴ Under Referee Kasher's implementing agreement, after the order selection list was created utilizing prior seniority rights, a company wide seniority system was to be used to award NJT positions to Conrail employees. Under this new system an employee's seniority is based on his earliest retained seniority dates as a trainman with Conrail or a predecessor railroad.⁵

4. X. TRAIN SERVICE ORDER SELECTION LIST

The following procedures will be instituted to establish the Order Selection List and NJTRO's Seniority Roster provided for in Article II.B. and shall govern the transfer of train service employees to NJTRO in accordance with Section 508 of the Rail Passenger Service Act, as amended by the Northeast Rail Service Act of 1981 (Section 1145).

A. The number of train service employees by prior prior right seniority district that were employed in the service operated for NJTRO, including assignments supporting such service as of August 1, 1982 are:

244.1 - Erie Lackawanna

230.4 - Penn Central

127.0 - Central Railroad of N.J.

B. On the basis of the above figures, the percentage allocations to be used in placing employees on the Order Selection List are:

40.58% - Erie Lackawanna

38.30% - Penn Central

21.12% - Central Railroad of N.J.

and the specific Order Selection List is as indicated in Section E of this Article X.

C. Employees will be placed on the Order Selection List on the basis of their prior prior or prior right seniority. In the event there are insufficient applications from employees with prior prior rights to fill the allocated numbers for any of the Penn Central prior prior right districts, the remaining employees below the last prior prior right employee of that district will be drawn from prior right Penn Central employees and placed on the Order Selection List on the basis of their prior right Penn Central roster standing. Vacancies remaining on the Order Selection List, following the exercise of prior prior and prior rights, will be filled with applicants from the District "G" train service roster on the basis of their Conrail seniority.

5. The provision in Referee Kasher's implementing agreement is Article X.D. which states:

Once train service employees have been placed on the Order Selection List in accordance with the foregoing principles, the
(footnote continued)

This creation of a company seniority system, rather than one based on prior rights, was advocated by NJT and intervenor UTU6 but was opposed by petitioner.

Referee Kasher's explanation of his decision to create a two step process to determine which employees are to be transferred to NJT and their relative seniority is found on page 14 of his arbitration opinion (Exhibit D to the Petition):

3. Prior Rights

The operating crafts organizations have sought full implementation of the concept of prior rights on NJTRO. Section 508(c)(5) speaks in terms of preserving employees' prior seniority rights on NJTRO, "to the extent possible." On the other hand, Section 508(c)(7) provides that these same employees shall have their prior rights on Conrail ensured.

standing of such employees for the purpose of bidding assignments with NJTRO shall be determined on the basis of their earliest retained seniority dates as trainmen with Conrail or a Conrail predecessor railroad. Such employees' prior prior or prior rights on Conrail are not disturbed by this Award.

6. In a proposed agreement submitted to Referee Kasher on October 1, 1982, by L.W. Swert, intervenor UTU proposed that "date of hire" seniority be the method for determining seniority on NJT. Paragraph 10 of that proposed implementing agreement states:

There will be a single Seniority Roster for Trainmen on NJTA effective January 1, 1983. This Trainmens Seniority Roster will encompass the entire area of NJTA operations. The NJTA Seniority Date for Trainmen transferring to NJTA and for Trainmen bidding for NJTA jobs and not awarded a position, the total of such employees not to exceed the number on the NJTA Seniority Roster established pursuant to paragraph 3, shall be the date of earliest retained seniority a Trainmen with Conrail or a Conrail predecessor railroad. The NJTA Seniority Date will be the only standard of seniority in awarding NJTA jobs after December 31, 1982. "Prior prior right" or "prior right" seniority will not be applicable on NJTRA after December 31, 1982. No trainmen however, will be required to exercise his seniority at a distance of more than 30 miles from his home or then current work site as a condition of maintaining his NJTA seniority unless otherwise provided in an applicable NJTA collective bargaining agreement.

In our Opinion the statute does not mandate retention of full prior rights on the commuter authority. "To the extent possible" requires, in our Opinion, recognition of the prior rights principle, while, at the same time, establishing a seniority system that NJTRO, as a new carrier, can administer properly and fairly.

Accordingly, we have used the concept of prior rights to determine initial bidding entitlements and identified the number of assignments attached to the prior right seniority districts for order selection list purposes. However, once the order selection lists have been established, NJTRO employees will have their seniority rights determined on the basis of their last date of hire, without a break in service, with Conrail or a predecessor carrier. The Awards ensure all prior and prior prior rights on Conrail.

From the discussion of prior rights in his opinion, it is apparent that Referee Kasher considered the question of preserving prior rights. His award provides for application of prior and prior prior rights for the purpose of determining which employees are to be transferred to NJT and for the utilization of date of hire to determine the relative seniority of those employees for bidding on positions with NJT. Referee Kasher's December 6th decision on petitioner UTU's request for clarification reaffirmed his intention to utilize this two step process.

In accordance with the mandate of §1136 of NRSA, Conrail ceased operation of commuter service on January 1, 1983. On that date NJT began its operation with train service employees awarded positions in accordance with Referee Kasher's implementing agreement.

DISCUSSION

A. Jurisdiction And Standard Of Review

As we have stated several times in previous cases,⁷ the Court has original and exclusive jurisdiction over actions seeking an interpretation of §508 of RPSA pursuant to the jurisdiction found in §1152(a) of NRSA. This Court has held that judicial review of a neutral referee's award under §508 is extremely limited and that petitioner must meet a heavy burden before it can succeed in having a referee's award set aside. NJT v. IBB, 550 F. Supp. at 1329. Section 508(d)(3) provides that such an award is to be "final and binding to the same extent as an award of an adjustment board under §3 of the Railway Labor Act". Judicial review under that section is limited to consideration of whether the arbitrator failed to comply with the statute's requirements, failed to act within his jurisdiction, or acted corruptly. Id. See Union Pacific Railroad Company v.

7. See Railway Labor Executives' Association v. Southeastern Pennsylvania Transportation Authority (SEPTA I), 534 F. Supp. 832 (1982), cert. denied, ___ U.S. ___, 102 S.Ct. 2271, 73 L.Ed.2d 1285 (1982); Railway Labor Executives' Association v. Southeastern Pennsylvania Transportation Authority (SEPTA II), 534 F. Supp. 852 (1982); International Brotherhood of Teamsters v. Southeastern Pennsylvania Transportation Authority (SEPTA III), 539 F. Supp. 1222 (1982); Railway Labor Executives' Association v. Southeastern Pennsylvania Transportation Authority (SEPTA IV), 547 F.Supp. 884 (1982) cert. denied, 51 U.S.L.W. 3457 (December 13, 1982); New Jersey Transit Rail Operations, Inc. v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, 550 F. Supp. 1327 (1982); American Railway & Airway Supervisors Association v. Southeastern Pennsylvania Transportation Authority, 551 F. Supp. 688 (1982); United Transportation Union v. Metro-North, Civil Action No. 82-26 (January 10, 1983).

Sheehan, 439 U.S. 89, 93, reh. den., 439 U.S. 1135 (1978); Air Line Pilots Association v. Eastern Air Lines, Inc., 632 F.2d 1321, 1323 (5th Cir. 1980); Brotherhood of Railroad Trainmen v. Central of Georgia Railway Company, 415 F.2d 403, 415 (5th Cir. 1969).

B. Arguments of Petitioner UTU

In support of its motion for a preliminary injunction, petitioner UTU argues that the Kasher award is illegal and contradicts the clear language of §508(c)(5) and §508(c)(7). Further, petitioner argues that the referee exceeded his jurisdiction by usurping the proper functions of the collective bargaining process contrary to the provisions of §510 of RPSA. Petitioner additionally asserts that the implementation of Referee Kasher's award would irreparably harm Conrail minority employees and would result in racial and sexual discrimination.

1. Failure To Comply With Statute

Petitioner contends that the Kasher award contradicts the clear language of §508 which calls for the protection of prior rights. It is assumed that petitioner is arguing that Referee Kasher did not act in compliance with the statute's requirements. Section 508(c)(5) provides that an implementing agreement shall "determine the procedure for determining seniority of such employees in the respective crafts or classes . . . which shall, to the extent possible, preserve their prior

seniority rights". Petitioner claims that Referee Kasher was bound to fully preserve all prior and prior prior seniority rights without any modification. This claim does not comport with the clear language of §508(c)(5) which contemplates some alteration in the seniority system when Conrail employees are transferred to a commuter authority. Indeed, petitioner, in its submission to the neutral referee, recognized that certain modifications to Conrail's seniority system would be necessary. Petitioner proposed that the award should create a single seniority district for NJT and that, except for standing on the order selection list, prior rights would not apply after January 1, 1983. Referee Kasher accepted this suggestion, see footnote 3. Now for the first time petitioner asserts that Referee Kasher, in order to comply with the statute, must reject its submission, and the submission of all other parties to the arbitration, and apply the seniority provisions of Conrail's collective bargaining agreements and the Conrail seniority district G roster in awarding positions with NJT. Such an assertion is without foundation.

While it appears that it would have been within the power of a neutral referee to require a commuter authority to recognize and apply, without any modification, the Conrail system of prior seniority rights, it is not the only plausible interpretation of §508(c)(5). The words "to the extent possible" in §508(c)(5) clearly contemplate that preservation of prior seniority rights is to be balanced against other considerations. The concern of Congress in requiring the

balancing of possibly conflicting considerations can be found in the statement of the Congressional conferees on §508:

The implementing agreement provided for in a new section 508 of the Rail Passenger Service Act is designed to provide for an orderly transfer of employees from Conrail to Amtrak Commuter or the commuter authorities. The conferees note their intent to provide for maximum flexibility to the employees and employers involved by providing generally for retention of seniority rights.

Explanatory Statement, 127 Cong. Rec. S9062 (daily ed. July 31, 1981). It is clear that Congress anticipated that certain changes in the applicability of prior seniority rights might be necessary to achieve flexibility in employee assignments. We find that Congress granted the neutral referee the discretion to determine the level of protection to be accorded to prior seniority rights. All parties to the arbitration proceeding, including petitioner, considered the establishment of a single seniority district for NJT necessary to obtain such flexibility. Referee Kasher acted in the context of an arbitration proceeding in which the commuter authority and intervenor UTU, the labor organization representing the majority of employees to be transferred, proposed the establishment of a company wide seniority roster based on date of hire. We find that Referee Kasher acted within the limits of his discretion in rejecting petitioner's position. It is clear that in exercising his discretion Referee Kasher complied with the statute's requirements in determining the procedure for the preservation of prior seniority rights.

Petitioner also contends that §508(c)(7) requires that

the implementing agreement ensure the retention of prior seniority rights. Section 508(c)(7) is specific in its terms which provide that the implementing agreement will "ensure the retention of prior seniority rights on Conrail of employees transferred to a . . . commuter authority . . ." (emphasis added). Section 508(c)(7) by its very terms does not apply to seniority rights in the employment of a commuter authority and Referee Kasher's award in no way affected the rights of employees on Conrail.⁸ Indeed Referee Kasher's award expressly provides for the retention and continued accumulation of freight seniority rights by those employees transferred to NJT. See Article X.D. of Referee Kasher's implementing agreement. Petitioner's reliance on §508(c)(7), therefore, is groundless.

2. Failure to Act Within Arbitrator's Jurisdiction

Petitioner contends that Referee Kasher exceeded his jurisdiction under §508 by infringing upon a subject more properly resolved within the §510 collective bargaining process. The specific contention is that Referee Kasher by establishing a date of hire seniority system went beyond the scope of his §508 authority and encroached upon a subject solely within the scope of the §510 negotiations. Although the creation of a seniority system for NJT employees is a proper subject of a collective bargaining agreement reached through the §510 process,

8. For a more complete discussion of §508(c)(7) see UTU v. Metro-North, Civil Action No. 82-26 (Sp. Ct. R.R.R.A. January 10, 1983).

the claim, that Referee Kasher necessarily encroached on the §510 process by establishing seniority procedures is not persuasive. As we established in ARASA v. SEPTA: "[T]he implementing agreement must be reached before new collective bargaining agreements are fully negotiated. Under these circumstances, it would be very difficult for an implementing agreement to totally avoid addressing some issues that are later subject to change during bargaining under section 510." 551 F. Supp. at 691. NJT and both petitioner and intervenor UTU acting together must reach a collective bargaining agreement pursuant to §510 and such an agreement may modify the seniority provisions of a §508 implementing agreement. We find that Referee Kasher addressed the prior seniority rights issue as required by §508(c)(5) and did not impermissibly infringe on the collective bargaining process of §510. Rather a charge could be made that Referee Kasher failed to act within his jurisdiction if he failed to "determine the procedure for determining the seniority of such employees" Therefore, petitioner's claim that the seniority provisions of Referee Kasher's award and implementing agreement were beyond his jurisdiction is rejected.

3. Civil Rights Claim

Petitioner UTU's final contention in its motion for a preliminary injunction is that the implementation of Referee Kasher's award will result in de facto discrimination against Conrail employees who are black, Hispanic, or women. Petitioner bases this assertion on general allegations that minority and

female employees of Conrail have fewer years of seniority than white male employees. Petitioner does not attempt, however, to explain how application of Conrail's present seniority system would protect minority or female employees to any greater extent than the seniority provisions of Referee Kasher's award.

During the process of transferring commuter rail service from Conrail to the commuter authorities a large number of Conrail employees are being offered a smaller number of positions with the commuter authorities. Certain employees will be able to choose among positions with Conrail, Amtrak, NJT, or SEPTA.⁹ Others with less seniority will be limited to the positions not desired by more senior employees. Petitioner does not offer any evidence or make any argument on how use of Conrail's seniority district G roster would prevent minority employees hired after a particular date from having less seniority than those Conrail employees hired before the same date. Nor does petitioner show how the full application of prior rights in awarding NJT positions would protect minority or female employees from being displaced by more senior employees. Date of hire seniority is a traditional mechanism for the assignment and allocation of jobs. Referee Kasher's award utilizes a system of seniority which removes a traditional restriction on an employee's ability to bid for jobs imposed by application of prior and prior prior rights. Some minority and female employees

9. See affidavit of Robert O'Neill, accompanying Conrail's memorandum in opposition to petitioner's motion for a preliminary injunction.

may be harmed by this system while others may benefit.

Petitioner has not offered any proof that the establishment of a company wide date of hire seniority system for NJT will have a disparate impact on minorities or women. Therefore, petitioner's claim that Referee Kasher's award is discriminatory is without merit.

C. Claims of Minority and Female Intervenor

1. Motion to Intervene

The Court now addresses the motion to intervene of individual minority and female employees of Conrail. The movants are twenty black, Hispanic, and female employees of Conrail and members of the UTU. In their motion they claim that they will be unemployed as a result of implementation of the seniority provisions of Referee Kasher's award. Movants seek an injunction to restrain NJT from altering the Conrail seniority district G roster of passenger conductors and trainmen. Movants also assert that petitioner does not adequately represent their position as minority and female employees. In their proposed complaint, they allege that the Kasher award is in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000-e, et seq., 42 U.S.C. §1981, 42 U.S.C. §1983, the Fifth and Thirteenth Amendments to the Constitution, and Executive Order 11246. Both NJT and Conrail have opposed the motion to intervene on the grounds that it was not timely. Indeed, movants seek to bar an act which was scheduled to take place on December 22, 1982, through proposed

intervention six days before that date and thirty-four days after the filing of the petition. Movants seek to press their claim in this matter beyond the eleventh hour. In spite of their untimely application, an order granting the motion to intervene was entered on January 21, 1983.

2. Motion for Preliminary Injunction

We must now decide whether the minority intervenors have established an adequate factual or legal basis for enjoining Referee Kasher's award. The minority intervenors claim that Referee Kasher's award is illegal because it results in the disparate treatment of minorities and women. They argue that from this disparate treatment the Court can discover discriminatory intent which is required in cases involving a bona fide seniority system. See, Teamsters v. United States, 431 U.S. 324 (1977); American Tobacco Co. v. Patterson, ___ U.S. ___, 102 S.Ct. 1534, 71 L.Ed. 2d 748 (1982). We hold, that on the facts as presented, disparate treatment of minority and female Conrail employees as a result of Referee Kasher's award has not been shown. On December 22, 1982, Conrail filed a supplemental response to the motion to intervene, attached to which, as Exhibit A, was the NJT seniority roster as of that date. That seniority roster contained the names of each successful bidder for a position with NJT. The names of ten of the minority intervenors appear on that roster. On December 23, 1982, Conrail filed an addendum to its supplemental response to the motion to intervene to which was attached the affidavit of Vincent F.

Cronan, Assistant Director - Labor Relations for Conrail. In that affidavit Mr. Cronan states that Conrail employment records show that seventeen of the twenty minority intervenors bid for positions with NJT under the terms of the Kasher award. Of those seventeen employees who bid for NJT positions four were not awarded a position with NJT. Each of those four employees was first employed by Conrail subsequent to April 1, 1976 and would not have been able to exercise prior seniority rights under the Conrail collective bargaining agreement since they had no prior seniority rights with respect to a Conrail predecessor railroad.¹⁰ The Court fails to see how the applicability or nonapplicability of prior seniority rights would affect the employment rights of the four unsuccessful minority intervenors. The full preservation and application of prior

10. See affidavit of Suzanne E. Woodard, accompanying motion to intervene. The four employees and their dates of hire are:

Suzanne E. Woodard	October 7, 1977
Carol B. Williams	June 1, 1977
Susan Greene	June 1, 1977
Tyrone C. McRae	October 13, 1977

According to the Cronan affidavit, three other intervenors employed in NJT service did not bid for a position with NJT. These employees and their dates of service are:

Angel Soto	March 10, 1978
Philip Warren	July 28, 1976
Ed F. Barnes	November 8, 1972

The only intervenor with prior seniority not awarded a position with either NJT or Amtrak was Ed F. Barnes. The supplemental affidavit of Woodard states by information and belief that Mr. Barnes bid for an NJT position. Mr. Cronan, in ¶E of his affidavit states that Conrail's records show that Mr. Barnes bid for a position with Amtrak and SEPTA but not with NJT.

seniority rights would not benefit minority employees who do not possess such prior rights. Intervenor's seem to misapprehend the meaning of prior seniority rights in the railroad industry. It is not disputed that the minority intervenors may have been adversely affected by the ability of senior Conrail employees to bid for positions that minority employees held prior to the transfer of commuter rail service to the commuter authorities. This adverse effect would occur, however, whether Referee Kasher's award completely preserved prior rights or not. Accordingly, we find no disparate treatment of non-whites or women resulting from the date of hire seniority system found in Referee Kasher's award and, therefore, deny the minority intervenors' motion for a preliminary injunction.

3. Motion for a Stay

The minority intervenors have also moved to stay this Court's order of December 21, 1982, denying petitioner UTU's motion for a preliminary injunction. In support of their motion to stay, intervenors argue that because Referee Kasher's award created a new seniority system that new system could not be a bona fide seniority system and, therefore, discriminatory intent need not be proven. We do not address this argument as intervenors have not shown disparate treatment resulting from the Kasher award. To support their factual presentation, intervenors offer a supplemental affidavit of Suzanne E. Woodard. This affidavit states that two white female intervenors were awarded positions with NJT while black female intervenors senior to the

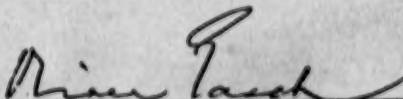
white intervenors were not successful bidders. The affidavit also states that one Hispanic and three black men were not awarded positions with NJT despite the fact that they were more senior to some persons awarded positions with NJT. Only one of the intervenors mentioned in Woodard's supplemental affidavit possessed prior seniority rights which may have been affected by Referee Kasher's award. Regarding that intervenor, however, it has not been established, or even alleged, that he was, or would have been, displaced by an employee with greater Conrail seniority but lesser prior right seniority on Penn Central.¹¹ None of the intervenors have demonstrated a loss of employment rights due to the establishment of a date of hire seniority system for NJT by Referee Kasher's award.

Insofar as the motion asks the Court to enjoin NJT from implementing the seniority provisions of the Kasher award, intervenors seek substantially more than a mere stay of our order denying petitioner's motion for a preliminary injunction. Minority intervenors seek to obtain the preliminary injunction which this Court declined to issue. For the same reasons intervenors' motion for a preliminary injunction was denied, the motion for a stay is also denied.

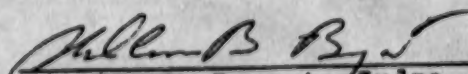
11. Whether that intervenor, Ed F. Barnes, bid for a position with NJT has been disputed by Conrail in the Cronan affidavit. See footnote 10.

CONCLUSION

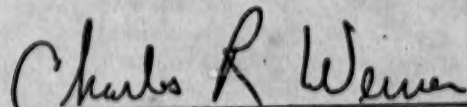
For the reasons stated herein, paragraph 18(a) of the petition must be dismissed. We hold that Referee Kasher acted both in accordance with §508 and within his jurisdiction when he established procedures for determining NJT seniority for Conrail employees based on the employees date of hire with Conrail or a predecessor railroad. The minority intervenors have failed to establish any disparate treatment of nonwhite or female employees resulting from the Kasher award. Therefore, their motion for a preliminary injunction and motion for a stay of our December 21, 1982 order denying petitioner's motion for a preliminary injunction are denied. This memorandum opinion constitutes our findings of fact and conclusions of law.



Oliver Gasch, Presiding Judge



William B. Bryant, Judge



Charles R. Weiner, Judge

February 8, 1983

FEB 14 1983

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

UNITED TRANSPORTATION UNION,

Petitioner,

vs.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Special Court,
Regional Rail Reorganization Act of 1973

BRIEF IN OPPOSITION

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Counter-Statement of Questions Presented

1. Whether 45 U.S.C. §1105(b), which gives this Court jurisdiction by direct appeal to review "orders or judgments" finding a provision of the Northeast Rail Services Act of 1981 to be unconstitutional, or upon a petition for a writ of certiorari to review "judgments", gives this Court jurisdiction to review an interlocutory order which is not based on a finding that a portion of the Act is unconstitutional.
2. Whether a statutory provision, 45 U.S.C. §588, which requires a neutral referee to devise the procedure for the transfer of employees from a railroad to a commuter authority, while considering changes in operating practices which would result in greater productivity to the maximum extent practicable and preserving seniority rights to the extent possible, prohibits any modifications in the existing seniority system.
3. Whether a seniority system awarded in accordance with 45 U.S.C. §588 is in violation of civil rights laws where there is no evidence of discriminatory impact or of discriminatory intent.

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NO. 82-1189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED TRANSPORTATION UNION,

Petitioner,

vs.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY, *et al.*,

Respondents.

**On Petition for a Writ of Certiorari to the Special Court,
Regional Rail Reorganization Act of 1973**

BRIEF IN OPPOSITION

Counter-Statement of the Case

This matter comes before the Court on a Petition for a Writ of Certiorari of the United Transportation Union to review an interlocutory order of the Special Court (created pursuant to the Regional Rail Reorganization Act of 1973) denying a preliminary injunction sought by

petitioner. The preliminary injunction sought was for an Order restraining respondent, NJ Transit Rail Operations, Inc.* (NJTRO), from using the seniority roster established by the award of a neutral referee pursuant to §508 of the Rail Passenger Service Act, 45 U.S.C. §588.

This matter arises under certain provisions of the Northeast Rail Services Act of 1981 (NRSA) (Pub. L. 97-35, Title XI, §§1131-1168, August 13, 1981) amending the Rail Passenger Service Act to add §§508-510 providing for the transfer of employees from the Consolidated Rail Corporation (Conrail) to commuter authorities. 45 U.S.C. §§588-590. These provisions were necessitated by another provision of NRSA providing that "notwithstanding any other provision of law or contract, Conrail shall be relieved of any legal obligation to operate commuter service on January 1, 1983." 45 U.S.C. §744a. Prior to that date, Conrail had been required to operate commuter service under contracts with commuter authorities pursuant to §304(c) of the Regional Rail Reorganization Act of 1973. 45 U.S.C. §744(c).

45 U.S.C. §§588-590 provided a three-step process for transferring employees from Conrail to commuter authorities. First, a factfinding process was to be completed in order to recommend "changes in operating practices and procedures which would result in greater productivity to the maximum extent practicable." 45 U.S.C. §589. The second step was the negotiation of Implementing Agreements to determine the number of employees and to identify the specific employees to be transferred to commuter authorities. 45 U.S.C. §588. Those negotiations were to be held between commuter authorities and repre-

* The legal name of respondent. Petitioner improperly named respondent in both its petition below and the instant petition.

representatives of the various crafts or classes of employees of Conrail to be transferred to commuter authorities. If the negotiations did not result in an agreement by August 1, 1982, the dispute was to be submitted to a neutral referee for binding arbitration. 45 U.S.C. §588(d). The transfer of employees was to be completed by January 1, 1983. The final step in the process is the negotiation of a collective bargaining agreement with representatives of the crafts or classes to be transferred to the commuter authority. 45 U.S.C. §590.

The instant dispute arises out of an Implementing Agreement awarded by a neutral referee after NJTRO and the various unions representing employees to be transferred to NJTRO were unable to reach an agreement pursuant to 45 U.S.C. §588 (Pa12).^{*} One of the neutral referee's tasks in determining the Implementing Agreement for the transfer of employees from Conrail to NJTRO, pursuant to that provision, was to:

determine the procedure for determining the seniority of such employees in their respective crafts or classes in Amtrak Commuter or with a commuter authority which shall, to the extent possible, preserve their prior seniority rights.

45 U.S.C. §588(c)(5). Pursuant to the existing Conrail collective bargaining agreements, Conrail employees performing the same function were restricted from bidding on positions outside existing seniority districts, which were based on the operating territories of Conrail's predecessor railroads. For the trainmen who are represented by the UTU there are five such seniority districts based

^{*}"Pa" refers to the Appendix attached to the Petition for a Writ of Certiorari. "Ra" refers to the Appendix attached to this brief.

on the old operating territories of the Erie, the Lackawanna, the Penn Central, the Reading and the Central Railroad of New Jersey railroads (Ra5-Ra6). However, NJTRO's commuter operations are administered as a single system (Ra14); the operating territories of the predecessor railroads are in close geographic proximity to one another. In its submission to the neutral referee, NJTRO showed that the use of the old seniority districts would impinge on operational flexibility and efforts to reduce costs (Ra7-Ra14).

After considering the arguments of the parties Neutral Referee Kasher found that:

In our Opinion the statute does not mandate retention of prior rights on the commuter authority. "To the extent possible" requires, in our Opinion, recognition of the prior rights principles, while at the same time, establishing a seniority system that NJTRO, as a new carrier, can administer properly and fairly.

Accordingly, we have used the concepts of prior rights to determine initial bidding entitlements and identified the number of assignments attached to the prior rights seniority district for order selection list purposes. However, once the order selection list has been established, NJTRO employees will have their seniority rights determined on the basis of their last date of hire, without a break in service, with Conrail or a predecessor carrier. The awards ensure all prior and prior prior rights on Conrail. (Ra16)

Thus, the neutral referee mandated a two-step process in order to determine which trainmen would transfer to NJTRO and their seniority after the transfer has oc-

curred. First, an Order Selection List was developed by alternating employees from each district on the basis of their level of seniority within their respective districts and the number of employees within each district (Pa13). After employees were transferred, however, seniority was determined in accordance with the years of employment with their prior employers, but was not based on the relative position of employees on the seniority rosters for the old seniority districts (Pa14). Petitioner asserts to this court, as it did below, that the above process will have a discriminatory impact on minorities and women. However, contrary to the claim in petitioners statement of facts that the assertions in the affidavits of Charles R. Jones and Suzanne Woodard are not substantially disputed, Robert O'Neill and Frank Flynn explained the fluid nature of the selection process, so that at the time of the hearing below it was unclear who the employees to be transferred were. (Ra17-Ra27)

The neutral referee's award was made on October 14, 1982. NJTRO filed an appeal of a portion of that award on October 19, 1982, *New Jersey Transit Rail Operations, Inc. v. International Brotherhood of Boilermakers*, 550 F. Supp. 1327 (Spec. Ct. 1982), which appeal was fully adjudicated by the Special Court by November 5, 1982. On November 12, 1982 petitioner filed a Petition for Review questioning three aspects of the award of Neutral Referee Kasher and also questioning four aspects of an award issued in arbitration between the UTU and the Southeastern Pennsylvania Transportation Authority (Pa15). Upon the motion of Conrail, the Special Court ordered an expedited determination of paragraph 18(a) of the UTU's Petition for Review (Ra1). Paragraph 18(a) was that portion of the petition challenging the use of the seniority roster required by the award of Neutral Referee Kasher (Pa16). Following the Order expediting consideration, on

December 10, 1982, petitioner filed a cross-motion requesting a preliminary injunction enjoining the use of the seniority roster required by the Kasher award (Ra3). Argument on the cross-motion and the expedited consideration was heard by the Special Court on December 17, 1982.* Noting that petitioner had a heavy burden of proof to succeed in setting aside the neutral referee's award, the Special Court denied the preliminary injunction on the ground that petitioner was unlikely to succeed on the merits (Pa3). The court also held that the public interest would not be served by any delay or disruption in the orderly transfer of employees from Conrail to NJTRO by January 1, 1983, as mandated by 45 U.S.C. §588(c) (6).** No judgment has been entered in this matter and the court has not filed an opinion.*** In addition, no action has been taken by the Special Court with respect to any of the other aspects of the Kasher award that were challenged by petitioner nor with respect to any aspects of the SEPTA award which were challenged in the petition for review before the Special Court.

* On that same day, a motion for intervention was filed on behalf of Suzanne Woodward, *et al.* challenging the Kasher award on the grounds that it discriminated against minorities and women. The motion to intervene was granted on January 21, 1983.

** Intervenors sought a stay from the Special Court of the denial of the preliminary injunction. As the motion for intervention had not been granted at that point, the Special Court did not rule on the motion for a stay. Thereafter, an application for stay was filed with this Court. (Docket No. A-614). That application was denied in a January 20, 1983 order.

*** Petitioner included in its Appendix a final order in *United Transportation Union v. Metro-North* (Spec. Ct., No. 82-25, Dec. 21, 1982) (Pa5). That is not an order in this matter.

Summary of Argument

A review of the statute upon which petitioner relies for jurisdiction, 45 U.S.C. §1105(b), reveals that it does not grant this Court jurisdiction to review interlocutory orders of the Special Court, where the order is not based on a finding that a provision of the Northeast Rail Service Act of 1981 is unconstitutional or invalid.

Petitioner seeks review of an award of a neutral referee made pursuant to a statute, 45 U.S.C. §588, which grants broad discretion to the referee to prescribe a procedure for transferring employees from Conrail to commuter agencies. The scope of review of that award is extremely narrow, being limited to a determination as to whether the referee failed to comply with the law, acted outside his jurisdiction, or acted corruptly. The arguments made by petitioner challenging the award are without merit and do not raise an important question of federal law.

Petitioner also argues that the neutral referee's award discriminates against minorities and women in violation of various statutory and constitutional provisions. However, that argument is based on facts not established in the record. Moreover, this Court has clearly held that even if a bona fide seniority system has a discriminatory impact, it does not violate laws against discrimination. There must be proof of discriminatory intent. No such proof has been shown in this matter.

ARGUMENT

- A. This Court lacks jurisdiction to grant a writ of certiorari because the order of the Special Court is not final.**

Petitioner requests a writ of certiorari to review an order denying preliminary injunctive relief only. Although petitioner states in the conclusion to its petition for a writ of certiorari that it seeks review of the judgment of the Special Court, no judgment has yet been rendered by the Special Court. Therefore this Court lacks jurisdiction to grant the relief sought.

Petitioner argues that §1152(b) of NRSA, 45 U.S.C. §1105(b), gives this Court jurisdiction to review this case on a petition for a writ of certiorari. However, that statutory provision does not give this Court jurisdiction where the action of the Special Court is not final. Under 45 U.S.C. §1105(b), provision is made for review by this Court of Special Court decisions under two circumstances, the first upon petition for a writ of certiorari and the second by direct appeal. The relevant portions of 45 U.S.C. §§1105(a) and (b) are as follows:

(a) Notwithstanding any other provision of law, the special court shall have original and exclusive jurisdiction over any civil action—

(1) for injunctive, declaratory, or other relief relating to the enforcement, operation, execution, or interpretation of any provision of or amendment made by this chapter, or administrative action taken thereunder to the extent such action is subject to judicial review;

• • •

(b) A judgment of the special court in any action referred to in this section shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States, except that any order or judgment enjoining the enforcement, or declaring or determining the unconstitutionality or invalidity, of any provision of this subtitle shall be reviewable by direct appeal to the Supreme Court of the United States. Such review is exclusive and any petition or appeal shall be filed not more than 20 days after entry of such order or judgment.

• • •

The above provision makes a clear distinction between a "judgment" which may be reviewed upon a writ of certiorari and "any *order* or judgment enjoining the enforcement, or declaring or determining the unconstitutionality or invalidity, of any provision" of the act which shall be reviewable by direct appeal (emphasis supplied). The use of the word "order" in the second portion of the section, but not in the first, must be construed to give this Court broader jurisdiction where it is used. Where the Special Court finds a provision of the statute is unconstitutional or invalid, this Court has been given jurisdiction to review interlocutory orders as well as judgments by direct appeal. Where the issue is merely interpretation of the statute or the correctness of its implementation, this Court has jurisdiction to review only a final "judgment."

Since 45 U.S.C. §1105 sets forth the exclusive method of review of Special Court actions referred to in that section, reliance upon any other provision of law to argue the reviewability of interlocutory orders would be misplaced. This is consistent with Professor Moore's interpretation of 45 U.S.C. §719(e)(3) which established

criteria for reviewability of Special Court decisions under the Regional Rail Reorganization Act of 1973, 45 U.S.C. §701 *et seq.* In considering whether 28 U.S.C. §1252, which authorizes an appeal from a judgment of "any court of the United States" in certain cases in which a federal statute has been held to be unconstitutional, could embrace judgments of the Special Court, Professor Moore concluded that "the better view is that the special methods for review enumerated in the Rail Act itself are exclusive, and that §1252 does not supplement the provisions of the Rail Act for Supreme Court review of orders or judgments of the Special Court." 12 Moore's Federal Practice ¶461.01[1]. Therefore, because 45 U.S.C. §1152(b) provides the exclusive basis for jurisdiction to review orders of the Special Court, this Court lacks jurisdiction to review an interlocutory order that is not based on a finding that a portion of NRSA is unconstitutional.*

Moreover, as no opinion has been issued by the Special Court, the precise grounds for the Special Court's ruling

* Even if the Court were to find that 45 U.S.C. §1105(b) gives it jurisdiction to review an interlocutory order which does not hold NRSA or any portion thereof unconstitutional, such a writ is not appropriate in this matter, because there has been no showing that this case requires deviation from normal appellate practice. Rule 18 of this Court provides that:

"a writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court."

Although the above rule is not strictly applicable to this matter as it deals with cases pending in the court of appeals, the rationale is clearly pertinent. Therefore, in the absence of the requisite showing, certiorari should be denied.

cannot be determined. Indeed NJTRO made arguments below that have yet to be addressed by the Special Court. Specifically, it was argued that the petition for review is barred by the compulsory counterclaim rule because petitioner failed to make its arguments to the Special Court at the time that NJTRO petitioned the Special Court to review the same award that is the subject of this matter. In addition, it was argued that petitioner's claim was barred by laches in view of the January 1, 1983 deadline for transfer contained in 45 U.S.C. §588(c)(6). Because the Special Court has yet to rule on these issues it is premature to issue a writ of certiorari to review the denial of the preliminary injunction.

B. A writ of certiorari should not issue to review the discretionary decision of the neutral referee determining the procedure for determining seniority of employees transferring to NJTRO.

Straining to find an inconsistency between the Special Court's denial of the preliminary injunction and decisions of this Court, petitioner argues that the Special Court decision conflicts with the general rule of statutory construction requiring a court to give effect to the ordinary meaning of words used in a statute. However, in taking the phrase "to the extent possible" out of context it is petitioner that has ignored the requirement that, in interpreting a statute, the court should "look to the provisions of the whole law and its object and policy." *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975).

In its petition to this Court, the UTU argues, as it did below, that the provision in 45 U.S.C. §588(c)(5), requiring the preservation of prior seniority rights "to the extent possible," gives the neutral referee no dis-

cretion and requires the maintenance of precisely the same seniority rights that existed with Conrail. That argument ignores the statutory framework. In this case the provision for an Implementing Agreement was a second step in the process prescribed in 45 U.S.C. §§588-590 "prescribing the method under which Conrail employees are to be absorbed by Conrail's successors." *New Jersey Transit Rail Operations, Inc. v. International Brotherhood of Boilermakers, etc.*, 550 F. Supp. 1327, 1328 (Special Ct., 1982). The Implementing Agreement follows the findings of the factfinding panel appointed pursuant to 45 U.S.C. §589, to recommend "changes in operating practices and procedures which would result in greater productivity to the maximum extent practicable." Thus, it is indisputable that Congress envisioned consideration of improvements in operating practices when a determination was made regarding the transfer of employees. Further, 45 U.S.C. §590 provides for the negotiation of new collective bargaining agreements after the Implementing Agreements are reached. In so doing Congress intended that:

Existing Conrail agreements would not apply to Amtrak Commuter or coramuter authorities that choose to operate their own service.

Explanatory Statement, 97th Cong., First Sess., 127 Cong. Rec. S. 9062 (July 31, 1981). Thus, commuter authorities are not bound by seniority provisions in existing collective bargaining agreements. When the statute is read as a whole it shows that Congress intended the maintenance of existing seniority rights to be one, but not the paramount, goal to be achieved in designing the Implementing Agreement. Also to be considered were improvements in productivity.

Thus, when Congress provided that existing seniority rights should be preserved, "to the extent possible," it meant to maximize the preservation of such rights only to the extent that such preservation could be done while also maximizing productivity gains. Indeed, that purpose of the labor provisions of NRSA can be found in the statement of the Senate Conferees.

The Implementing Agreement provided for in a new Section 508 of the Rail Passenger Service Act is designed to provide for an orderly transfer of employees from Conrail to Amtrak Commuter or the commuter authorities. The conferees note their intent to provide for maximum flexibility to the employees and employers involved by providing generally for the retention of seniority rights. . . .

• • •

The factfinding panel should look at a variety of changes which may improve productivity, *such as flexibility in employee assignments* and ensuring an appropriate number of employees for particular tasks. (emphasis supplied).

Explanatory Statement, 97th Con., First Sess., 127 Cong. Rec. S. 9062 (July 31, 1981). As explained in the NJTRO presentation to the neutral referee, the use of a single seniority district is necessary to obtain such flexibility. The undisputed evidence presented by NJTRO showed that a single seniority district would result in significant operational savings and efficiency. Those efficiencies provided the basis for the neutral referee's Award. Thus, the Award changing the seniority system to provide for one seniority district is consistent with the statute.

In *New Jersey Transit Rail Operations, Inc. v. International Brotherhood of Boilermakers, etc., supra*, at 1329,

the Special Court recently discussed the standard for judicial review of an arbitrator's award pursuant to 45 U.S.C. §588. Recognizing that 45 U.S.C. §588(d)(3) states that the award is to be "final and binding to the same extent as an award of an adjustment board under Section 3 of Railway Labor Act," the Special Court followed decisions of this Court stating the standard of review under that statute:

Judicial review of arbitrators' determinations under that Act is very limited. In *Union Pacific Railroad Company v. Sheehan*, 439 U.S. 89, reh. den. 439 U.S. 1135 (1978), the Supreme Court held that in order to overturn such a decision there must be a showing either that the arbitrator failed to comply with the Act's requirements, failed to act within his jurisdiction or acted corruptly. 439 U.S. at 93.

The Court may not substitute its opinion for that of the referee. *Id.* at 1331. The above standard of review was used by the Court in denying the preliminary injunction. Because broad discretion was granted to the Referee and the transfer process is a one-time event that will not be repeated, this issue does not raise an important question of federal law so as to merit the granting of a writ of certiorari. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1954).

C. Because it does not appear in the record that the seniority system ordered will discriminate against minorities and women, no evidence of intentional discrimination was presented, and the seniority system ordered by the neutral referee is a bona fide seniority system in accordance with 45 U.S.C. §588(c)(5), the seniority system is consistent with applicable civil rights laws and decisions of this Court.

Initially, the Court should recognize that because no judgment has been entered or opinion written by the Special Court, the reasons of that Court for rejecting petitioner's, as well as intervenor's, arguments that the award would illegally discriminate against minorities and women are not known. Therefore, a writ of certiorari to review that determination would be premature. Petitioner relies on affidavits of Charles Jones and Suzanne E. Woodard to the effect that the award of the neutral referee would result in an all male work force and would virtually eliminate all minority employees. However, as was explained in the affidavits of Frank J. Flynn and Robert O'Neill, at the time of the hearing below the effect of the award on all employees, including minorities and women, could not be determined. Thus, not even a discriminatory impact of the award could be shown. Even if there was such an impact, as 45 U.S.C. §588 clearly envisioned recognition of existing seniority rights, such an impact cannot be found to be in violation of congressional intent.

Moreover, this Court has clearly ruled that, for a seniority system to be in violation of Title VII of the Civil Rights Act, a plaintiff must show an intent to discriminate. *American Tobacco Co. v. Paterson*, — U.S. —, 71 L. Ed. 2d 748 (1982). Petitioner has cited no evidence of such discriminatory intent in this case. In fact, there is no evidence that Neutral Referee Kasher had any discriminatory

intent when he issued his award, or that he was aware of the alleged discriminatory impact. This Court recently held that:

[d]iscriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive.

Pullman-Standard v. Swint, — U.S. —, 72 L. Ed. 2d 66, 81 (1982). In this case there has been no evidence of such actual motive. It is, therefore, clear that there has been no violation of Title VII of the Civil Rights Act of 1964.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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*Attorney for Respondent, NJ Transit
Rail Operations, Inc.*

JAMES J. CIANCIA,
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Of Counsel.

KENNETH S. LEVY,
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Deputy Attorneys General,
On the Brief.

APPENDIX

**Order by Special Court for Expedited Determination
of a Portion of the Petition for Review**

(Filed—December 9, 1982)

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

Section 1152 Panel

C.A. No. 82-25

UNITED TRANSPORTATION UNION,

Petitioner,

v.

**SOUTHEASTERN PENNSYLVANIA TRANSPORTA-
TION AUTHORITY, NEW JERSEY RAIL OPERA-
TIONS, INC.,**

Respondents,

and

CONSOLIDATED RAIL CORPORATION,

Rule 19 Party.

**Upon consideration that Consolidated Rail Corporation
("Conrail") filed a Motion for Expedited Determination**

*Order by Special Court for Expedited Determination
of a Portion of the Petition for Review*

of paragraph 18(a) of the Petition of the United Transportation Union for Review so that Conrail will be able to initially award positions under Referee Kasher's award, and that all parties had an opportunity to file written objections, and no written objections have been filed,

IT IS ORDERED that Petitioner United Transportation Union file any pleadings in support of paragraph 18(a) of its Petition for Review, and deliver any such pleadings to each judge of the §1152 Panel and counsel for all parties, not later than December 10, 1982; and,

IT IS FURTHER ORDERED that any replies or objections to the Petitioner's pleadings in support be filed and delivered to each judge of the §1152 Panel and counsel for all parties not later than December 15, 1982; and,

IT IS FURTHER ORDERED that oral argument on paragraph 18(a) of the Petition for Review, if deemed necessary by the Court, shall be on December 17, 1982 at a time and location to be established by further order of the Court.

Richard E. Eriksen
Executive Attorney
For the Court

December 9, 1982

Cross Motion for Preliminary Injunction
SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973
Civil Action No. C.A. 82-25

UNITED TRANSPORTATION UNION,
Petitioner,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTA-
TION AUTHORITY, NEW JERSEY RAIL OPERA-
TIONS, INC.,

Respondents,

and

CONSOLIDATED RAIL CORPORATION,

Rule 19 Party.

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, petitioner, United Transportation Union [hereinafter, "UTU"] respectfully moves this Court for a preliminary injunction restraining respondent, New Jersey Rail Operations, Inc. [hereinafter, "NJRT"], its officers, assigns, agents, employees, and any person or entity acting under contract on its behalf from changing the seniority order (the G roster) of the UTU membership as it pres-

Cross Motion for Preliminary Injunction

ently exists on Consolidated Rail Corporation [hereinafter, "Conrail"].

Respectfully submitted,

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**Portion of Factual Presentation in Support of NJT Rail
Motion for Award of Implementing Agreement—
Operating Employees**

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.

**A Subsidiary of
NEW JERSEY TRANSIT CORPORATION**

October 1, 1982

• • •

***B. Separate Operating Craft Seniority Districts
Must Be Consolidated***

It is misleading to speak of one Conrail—New Jersey labor force, for in fact there are many. These forces operate, in many respects, almost as they did prior to the formation of Conrail. Most importantly, many separate labor agreements between the bankrupt railroads which preceded Conrail and individual crafts and classes of operating employees still survive. Section 504(d) of the 3R Act contemplated negotiation of single collective bargaining agreements for Conrail employees. This has yet to be accomplished for operating employees. Resolution of prior right claims has been one of the principal stumbling blocks.

Consequently, separate district seniority rosters which reflect the operating employees' prior rights on the predecessor bankrupt railroads are still maintained (hereafter

*Portion of Factual Presentation in Support of NJT Rail
Motion for Award of Implementing Agreement—
Operating Employees*

"prior rights").⁴ See Figure No. 1. Conrail's seniority districts in New Jersey for the operating crafts are as follows:

Penn Central. Employees of the former Penn Central have seniority on the Northeast Corridor Line and the North Jersey Coast Line electric service. The employees of the former Penn Central are the only group with the right to operate into New York City.

Central New Jersey. Employees of the former Central New Jersey have seniority on the North Jersey Coast Line diesel service, Raritan Valley and the West Trenton Line. All of these lines terminate in Newark.

Reading. Employees of the former Reading Railroad have seniority on the West Trenton Line from the West Trenton station to the Calco station.

Lackawanna. Employees of the former Lackawanna railroad have seniority on the Gladstone Line, Montclair Branches, Morristown and Boonton Lines, all of which terminate in Hoboken. These

⁴ "Prior rights" are the seniority rights accumulated on the bankrupt railroads which were carried over to Conrail by the bankrupt railroad employees who became employees of Conrail. Some of the bankrupt railroads, such as the Erie-Lackawanna, were products of earlier railroad mergers. Many of the bankrupt railroads had employees whose employment preceded the earlier mergers, and who had accumulated seniority on the pre-merger railroads. These seniority rights survived the merger, and indeed were carried over into Conrail. These early seniority rights are referred to as "prior prior rights."

*Portion of Factual Presentation in Support of NJT Rail
Motion for Award of Implementing Agreement—
Operating Employees*

employees also have seniority on the Main Line from Patterson station to Hoboken.

Erie. Employees on the former Erie railroad have seniority the Pasack Valley, Bergen and Main lines, and on the Boonton Line from the Mountain View station to Hoboken. All of these lines terminate in Hoboken.

There are several instances where the seniority districts overlap. For example, employees from the former Penn Central and CNJ both work on the New Jersey Coast Line. Employees from the former CNJ only operate as far as Newark, with employees from the former Penn Central operating into New York City. Similarly, Erie and Lackawanna employees both work and hold prior seniority rights on different portions of the Boonton and Main Lines.

1. Commingling And The Elimination Of Seniority Districts Based On Pre-Conrail Railroads Will Improve Operation Of Existing Commuter Rail System

There are almost no interchangeable rights among the groups of employees with separate seniority districts. Each group holds "prior rights" to operate trains on the lines within its own seniority district. Under current seniority district limitations, an employee's assignment must be limited to the locale historically serviced by the bankrupt railroad which employed the operating employee. Accordingly, Conrail cannot post assignments which combine duties in territories covered by separate

*Portion of Factual Presentation in Support of NJT Rail
Motion for Award of Implementing Agreement—
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seniority districts. For example, although former CNJ and Penn-Central trains both serve Newark's Penn station, an engineer assignment cannot be posted which contains duties on both runs. The same is true with respect to former Erie and former Lackawanna runs. Commingling of service would eliminate these artificial distinctions.

Consolidation of the operating crafts' separate seniority rosters and the implementation of commingling will improve commuter rail service because it will permit NJT Rail to post assignments which reflect the unitary nature of commuter rail service in the state of New Jersey.

First, commingling will improve scheduling for riders. The restrictions imposed by multiple seniority districts limits the rail services available to commuters. For example, as noted earlier, employees of the former Penn Central and CNJ both work and hold "prior rights" on portions of the North Jersey Coast Line. This occurred in 1967 when the CNJ trains on the North Jersey Coast Line were rerouted to Newark to permit CNJ trains to operate for the first time on Penn Central tracks between Perth [sic] and Newark. The respective railroads agreed the CNJ railroad would not pick up passengers at stations historically served by the Penn Central.

After consolidation of these railroads in Conrail, these distinctions should have become wholly meaningless. Yet Conrail has been unable to negotiate new agreements under section 504 of the 3R Act. Consequently, in 1980, when NJT tried to arrange for a new summer rail service on the North Jersey Coast which could collect passengers from all stops on the route between Newark and South Amboy,

*Portion of Factual Presentation in Support of NJT Rail
Motion for Award of Implementing Agreement—
Operating Employees*

it could not obtain concurrence among local union committees to permit the trains operated by former CNJ employees to make those stops. As a result, Jersey Shore riders have had to wait longer for trains, received more limited service, and have been generally inconvenienced.

Similarly, scheduling on the Boonton Line is constrained because former Lackawanna employees are precluded from stopping between Mountain View and Hoboken on the Boonton line. These stations were historically served by the Erie railroad.

Second, commingling will increase the productivity of the operating employees and reduce the number of crews required to provide commuter rail service. This possibility is best illustrated by reference to the operation and staffing of the Newark Division, with its separate seniority rosters for former Penn Central and CNJ employees.

Under the current system of separate seniority districts with their distinct assignments, 85 crews consisting of 334 employees are required to operate the Newark Division over a seven day period; 85 engineers, 78 conductors, and 181 other trainmen. 63 crews are required on a typical workday. The multiple seniority districts produce overstaffing of the commuter rail system in two ways. As noted earlier, train crews are presently unable to stop at all stations on the lines on which they operate. Second, inability to commingle work in a single assignment interferes with management's need to develop a rail operating plan consistent with the needs of the commuter system. The existing seniority districts act as artificial barriers to the efficient allocation of manpower, thus unnecessarily increasing the number of crews and deadheading time.

*Portion of Factual Presentation in Support of NJT Rail
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Commingling will increase the productivity of the train crews. A more efficient allocation of operating employees within the commuter system will reduce the amount of time employees spend deadheading and laying over between operating trains. Practice under Conrail often requires either the crews awaiting a particular train's scheduled departure or a train being scheduled merely to accommodate the movement of the crew.

With the implementation of unified seniority districts and commingled assignments, the consolidation of current seniority rosters, NJT Rail estimates that the Newark district could be operated with only 54 crews on a typical weekday. Although only an estimate, this reduction of 9 crews or 32 operating positions could result in an annual savings of more than \$1.2 million. Such productivity improvements and savings are not limited to the Newark district, and must not be overlooked during this period of fiscal adversity.

*2. Commingling And The Consolidation Of Seniority
Districts Is Essential To Realize The Value of NJT's
Capital Improvement Program*

In order to increase ridership and to streamline operations, NJT and the federal government have long recognized that it is essential to turn the component lines of the North Jersey rail system into a unified and coordinated whole. Nearly a billion dollars has been or will be spent to this end. Irrespective of prior, or prior prior rights, trains must be permitted to be re-routed so that they may service major destination points not cur-

*Portion of Factual Presentation in Support of NJT Rail
Motion for Award of Implementing Agreement—
Operating Employees*

rently served. If duplicative crews or penalty payments were required when a train left one seniority district and entered another, this investment would largely be wasted. A description of the capital projects completed and underway will make clear the compelling need to eliminate the suffocating effect of the existing multiple seniority districts on the system.

Kearny Connection

As has been explained previously, the North Jersey commuter rail system is divided into two separate and unconnected operating districts: the Hoboken district, and the Newark district.

While most commuters in the Newark district have direct access through Penn Station (Newark) to mid-town New York, the same is not true for riders on the Hoboken district. Midtown Manhattan commuters on the Hoboken district's Morristown lines are now required to make a very inconvenient connection at Hoboken Station to PATH midtown service. Passengers are required to walk to the PATH terminal, await the next subway service and then spend an additional 15-20 minutes reaching midtown New York.

In recognition of this problem, the State of New Jersey is expending more than \$400 million in federal and state funds to re-electrify the Morristown line (Lackawanna seniority roster) so that its traction system is basically compatible with the Northeast Corridor (Penn Central seniority roster). In anticipation of the 1983 completion of the re-electrification project, NJT Rail Staff have ac-

*Portion of Factual Presentation in Support of NJT Rail
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tivated plans for the \$55 million construction of a connection in Kearny to create a physical link between these lines and afford the Morristown line ridership direct rail access into Penn Station, New York.

Prior rights could thwart the effectuation of the Kearny Connection by blocking Lackawanna crews from serving Penn Station, New York, or requiring a costly change of crews between Kearny and New York City. Seniority rosters for the new NJT Rail Commuter rail operation must be merged so that important improvements such as this can be carried out without undue cost or institutional friction.

Montclair Connection

Even though the tracks of the Montclair branch of the Morristown line and the tracks of the Boonton line pass within 2000 feet of each other in Montclair, they do not in fact connect. Rather, the Boonton tracks bypass downtown Newark altogether, terminating in Hoboken, while the Montclair branch stops at Newark's downtown Broad Street terminal.

At the cost of \$15-20 million dollars, NJT Rail plans to connect the Boonton line and Montclair branch in Montclair, which would afford Boonton riders access to downtown Newark and would promise operating savings.

Again, the continued existence of seniority districts between the Erie (Boonton) and Lackawanna (Boonton and Montclair Branch) rosters could thwart this project. Under existing rules, trains and crew from the Erie roster cannot travel on the Montclair Branch.

*Portion of Factual Presentation in Support of NJT Rail
Motion for Award of Implementing Agreement—
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Meadows Shop

At the cost of approximately \$90 million dollars, NJT Rail is in the process of building a new "state of the art" consolidated maintenance facility in the Meadows yards in Kearny, New Jersey. When that facility is completed, NJT Rail will be able to close antiquated and obsolete facilities and consolidate servicing, inspection, repair and overhaul operations for its entire commuter rail system at its Meadows Shop.

One of the great advantages of the New Meadows Shop will be its central location, easily accessible to all North Jersey lines of the system. Unfortunately, because of that central location, it will be necessary for virtually all crews to use "foreign" track to bring equipment to the shop. For example, Penn Central crews will be required to travel on Erie Lackawanna track and vice-versa. It is important that many of the logistical advantages of this important new facility not be lost on account of special crewing rules dictated by current seniority districts.

New Jersey Coast Line Electrification

On the North Jersey Coast line, crew with prior Penn Central rights have historically operated an electric service from South Amboy to Penn Station, New York and diesel/electric service from Bay Head to Penn Station, New York, while since 1967 former CNJ crews operate the diesel service from Bay Head to Newark. As noted earlier, the CNJ crew cannot stop at stations between South Amboy and Newark, since Penn Central crew have prior rights there.

*Portion of Factual Presentation in Support of NJT Rail
Motion for Award of Implementing Agreement—
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At cost of \$130 million, NJT Rail has extended electrified service from South Amboy to Matawan and expects to invest an additional large sum to extend electrified service to Long Branch. The extension to Long Branch would effect a major schedule revision and severely disrupt the historic balance between the Penn Central and CNJ seniority districts. The further extension of electrification on the North Jersey Coast line will be unduly complicated, if not delayed or harmed, without a merger of seniority districts and the ability to post assignments which cross old railroad property distinctions at the outset of NJT Rail operations. Under the current system NJT Rail institutes new operations at its peril, risking discord and time claims based on conflicting claims as to seniority rights to the new assignments.

In summary, New Jersey is in fact a single commuter rail system. But the existence of archaic seniority districts which have evolved over a hundred years on five defunct railroads has forced it to operate as many separate sub-systems rather than as a unified whole. Multiple seniority districts must be replaced with one district for trainmen and for enginemen. While a person's seniority on a predecessor railroad cannot be ignored, it cannot be used to hinder the right of NJT Rail to manage the State's commuter service in a unitary manner. It is partly in recognition of the substantial service and cost benefits of a unified system that the State of New Jersey has committed huge capital expenditures to the rail transit system. If the cost and service benefits of investment are not realized due to the continued existence of multiple seniority districts and if other important improvements in operation are slowed, the resulting loss of public confidence and support will weigh heavily on both the system and on its employees.

**Portion of Arbitration Opinion and Awards,
October 14, 1982**

**IMPLEMENTING AGREEMENTS ARBITRATION
PURSUANT TO SECTION 508 OF THE RAIL
PASSENGER SERVICE ACT, AS AMENDED**

**IN THE MATTER OF AN ARBITRATION AMONG
NEW JERSEY TRANSIT RAIL OPERATIONS, INC.**

and

CONSOLIDATED RAIL CORPORATION

and

**THE LABOR ORGANIZATION REPRESENTATIVES
OF THE INVOLVED CRAFTS AND CLASSES OF
EMPLOYEES**

• • •

3. *Prior Rights*

The operating crafts organizations have sought full implementation of the concept of prior rights on NJTRO. Section 508(c)(5) speaks in terms of preserving employees' prior seniority rights on NJTRO, "to the extent possible." On the other hand, Section 508(c)(7) provides that these same employees shall have their prior rights on Conrail ensured.

Portion of Arbitration Opinion and Awards
October 14, 1982

In our Opinion the statute does not mandate retention of full prior rights on the commuter authority. "To the extent possible" requires, in our Opinion, recognition of the prior rights principle, while, at the same time, establishes a seniority system that NJTRO, as a new carrier, can administer properly and fairly.

Accordingly, we have used the concept of prior rights to determine initial bidding entitlements and identified the number of assignments attached to the prior right seniority districts for order selection list purposes. However, once the order selection lists have been established, NJTRO employees will have their seniority rights determined on the basis of their last date of hire, without a break in service, with Conrail or a predecessor carrier. The Awards ensure all prior and prior prior rights on Conrail.

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Affidavit of Frank J. Flynn

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

Section 1152 Panel

Civil Action No. 82-25

UNITED TRANSPORTATION UNION,

Petitioner,

v.

**SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY, et al.,**

Respondents.

FRANK J. FLYNN, of full age, being duly sworn upon his oath deposes and says:

1. I am the Regional Manager of the New Jersey Commuter Region of the Consolidated Rail Corporation (Conrail). In that position I report directly to R. C. Sullivan, Vice President-Passenger Operations of Conrail. I have overall responsibility for commuter rail operations in New Jersey which include the operation of more than 500 trains daily. I supervise all operating, maintenance of equipment, maintenance of way, police and public relation employees in the New Jersey Commuter Region. In my posi-

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tion as Regional Manager I also have responsibility for coordinating efforts for the posting and awarding of positions in the Region, with personnel in Conrail's labor relations department.

2. Effective January 1, 1983 I will become the Assistant Vice President-Operations of the New Jersey Transit Rail Operations, Inc. (NJTRO) which will be taking over all commuter rail operations in New Jersey from Conrail on January 1, 1983, pursuant to the provisions of the Northeast Rail Services Act of 1981. In the position of Assistant Vice President-Operations I will have substantially the same responsibilities I presently hold as Regional Manager of the New Jersey Commuter Region for Conrail.

3. I have had responsibility for assisting in the coordination of efforts for a smooth orderly transfer of operational responsibility from Conrail to NJTRO on January 1, 1983. Included in that responsibility has been those efforts directed at transferring the employees from Conrail to NJTRO.

4. In accordance with the Implementing Agreement awarded by Richard Kasher pursuant to Section 508 of the Rail Passenger Service Act, on or about November 2, 1982 Conrail posted notices advising employees that commuter rail positions in New Jersey would be transferred to NJTRO effective January 1, 1983. On November 22, 1982 Conrail posted notices advising employees that they could bid on those positions to be transferred to NJTRO. All bids were received by December 2, 1982 and Conrail employees have been working to review those bids so that the positions to be transferred to NJTRO may be awarded. We are making every effort to make those awards on Decem-

Affidavit of Frank J. Flynn

ber 17, 1982. If awards are made on that date, employees will be in their new positions by December 22, 1982.

5. If this Court were to reverse the Implementing Agreement, it would require readvertisement and reawarding of those positions. That effort would take at least 20 days and, therefore, could not be completed prior to January 1, 1983. Specifically, it would take approximately three days to prepare and post the advertisements. There are 578 different assignments which would have to be printed and then mailed to the approximately 45 locations for posting on bulletin boards which the present seniority districts encompass for both passenger and freight service. We are obligated, by the collective bargaining agreement, to post advertisements at every location where train crews go on or off duty. In order to allow for the fact that employees may be on vacation, out sick, or absent from work for some other reason, seven days must be allowed for employees to bid on positions. Once the bids have been received, it will take approximately another seven days review the bids, make and print the awards and mail them so that they may be posted at the appropriate locations. This task is made all the more difficult by the fact that it would have to be accomplished during the holiday season when there are three union holidays for certain employees and many union employees are taking vacations. Once the awards are made, employees must be allowed at least three days notice before they report to their new positions.

6. Any attempt at this time to readvertise and reaward the trainmen positions would play havoc with our efforts at accomplishing a smooth and orderly transition on January 1, 1983. The payroll system is being changed from com-

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puter to a semi-computer manual system. If we don't know the employees who are coming over by that date, it won't be possible to pay employees in a timely manner.

7. I have read Charles P. Jones' affidavit. At pages 7 through 10, he discusses the impact of the Order Selection List on Non-Minority and Minority employees. That discussion misconstrues the nature of that list as it assumes that the 610 trainmen on the list are the same 610 trainmen that will ultimately be transferring to NJTRO. In fact, the same employees also have a right to bid for positions at Conrail, Amtrak and SEPTA. Until the bidding is completed, it will not be known which employees will in fact transfer to NJTRO. Moreover, in view of the fact that the individuals on the Order Selection List have substantial seniority, it is not unlikely that they will choose positions at Amtrak or Conrail which offer higher rates of pay than NJTRO is willing to offer. It is, therefore, not possible at the present time to make a judgment as to what effect the final Order Selection List will have on any employees. Therefore, no judgment can be made concerning what effect the employee transfer provisions will have on minority employees. Until all bids are reviewed and awarded, it cannot be determined where individual employees will be assigned. It is not anticipated that any significant number of employees will be furloughed as a result of the January 1, 1983 transfer. Moreover, any employees furloughed by NJTRO will maintain their existing seniority rights at Conrail.

s/ FRANK J. FLYNN

(Sworn to December 15, 1982.)

Affidavit of Robert O'Neill
SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973
Section 1152 Panel
No. 82-25

UNITED TRANSPORTATION UNION,
Petitioner,

v.

**SOUTHEASTERN PENNSYLVANIA TRANSPORTA-
TION AUTHORITY, NEW JERSEY TRANSIT
RAIL OPERATORS, INC.,**
Respondents,
and

CONSOLIDATED RAIL CORPORATION,
Rule 19 Party.

COMMONWEALTH OF PENNSYLVANIA } ss.:
COUNTY OF PHILADELPHIA

After being duly sworn **ROBERT O'NEILL** deposes and says:

1. I, **ROBERT O'NEILL**, am the Manager-Labor Relations of the Eastern Region of the Consolidated Rail Corporation (Conrail) with offices at Room 420, 30th Street Sta-

Affidavit of Robert O'Neill

tion, Philadelphia, Pennsylvania 19104, and I am authorized to represent Conrail's interest herein and make this affidavit in support of Conrail's Memorandum in Opposition to Petitioner's Motion for a Preliminary Injunction, which Memorandum, to the best of my knowledge and belief, is true and accurate.

*Placement of Conrail Train Service Employees
on NJTRO, SEPTA, and Amtrak Positions*

2. My duties and responsibilities at Conrail include the administration of its collective bargaining agreements in the Eastern Region, and as part of these duties and responsibilities I am responsible for the administration of the arbitrated awards and the implementing agreement which set forth the procedures to be used for Conrail employees to be transferred to and employed by the New Jersey Transit Rail Operations, Inc. (NJTRO), the Southeastern Pennsylvania Transportation Authority (SEPTA) and the National Railroad Passenger Railroad Corporation (Amtrak). The transfers to NJTRO and SEPTA are pursuant to Section 508 of the Rail Passenger Service Act (RPSA), as amended by the Northeast Rail Service Act of 1981 (NRSA), and the Amtrak transfers are pursuant to Section 1165 of NRSA. Included in these responsibilities is the transfer of train service employees in Conrail Seniority District G, who are represented by the United Transportation Union (T&C) (UTU).

3. The arbitrated UTU implementing agreements for SEPTA, as determined by Dr. Quinn, and for NJTRO, as determined by Referee Kasher provide for the establishment of Order Selection Lists of employees that indicate

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an interest in employment with either or both the authorities. The implementing agreement among Conrail, Amtrak, and the UTU sets forth procedures for Conrail employees to bid for assignments and become employees of Amtrak. Current Conrail train service employees holding seniority within District G may indicate an interest in employment with one or more of the new employers. The employees who timely indicated an interest in employment with one or more of the commuter authorities initially were placed on the appropriate Order Selection List or Lists. Eligible employees now have had an opportunity to bid on offered positions with all three new employers. When there is an indication that an employee can obtain a position with more than one employer, the employee then is asked to withdraw any duplicative bids requesting employment with other employers. The effect of the employee's withdrawal of duplicative bids is to permit the employee to work for the employer of his choice and prevent the awarding of positions with more than one employer.

Implementation of the NJTRO Implementing Agreement

4. To date, approximately 1,750 hours of Conrail employee time have been utilized to implement the NJTRO Section 508 implementing agreement awards. It is anticipated that approximately 320 additional hours of Conrail employee time will be necessary to complete this task.

5. The arbitrated implementing agreement award which was determined by Referee Kasher pursuant to RPSA Section 508 provides the method by which Conrail employees are selected for transfer to NJTRO. At NJTRO's request, Conrail has agreed to award the initial train service posi-

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tions, which are scheduled to be effective on December 22, 1982. Because of the delay due to litigation, the procedures and the dates to implement Referee Kasher's Award, as modified by the parties, are as follows:

A. From November 2, 1982 through November 12, 1982 a special advertising bulletin was posted pursuant to Article II.A of Referee Kasher's Award soliciting written indications of interest from qualified train service employees. 1,766 train service employees submitted such applications.

B. In accordance with Article II.B of Referee Kasher's Award and the Conrail collective bargaining agreement, employees who submitted a written indication of interest pursuant to Article II.A are eligible for inclusion on the NJTRO Order Selection List. The number of employees on the final Order Selection List equals 610, which is the number of employees in NJTRO commuter service on August 1, 1982.

C. The Conrail collective bargaining agreement permits train service employees from Seniority District G to bid on the positions in NJTRO service (hereinafter referred to as "NJTRO Position"). Seniority District G encompasses a geographic area extending approximately from Washington, D. C. to New York City and westward to Harrisburg, Pennsylvania, Sayre, Pennsylvania, and Port Jervis, New York. Train service employees on the Seniority District G roster with prior rights seniority from the Erie Lackawanna (EL), Penn Central (PC), and the Central of New Jersey (CNJ) Railroads have prior rights seniority on NJTRO positions. Additionally, because of the previous mergers of the Lehigh Valley Railroad and the Reading Railroad seniority rosters into the CNJ rosters, certain train service employees from these two predecessor

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railroads also have prior CNJ seniority rights. All other train service employees on the Seniority District G roster would have only Conrail seniority when bidding for NJTRO positions. Article X of the Kasher Award prescribes the procedures for the establishment of the Order Selection List and dictates the Order Selection Number based on the employee's standing on the List.

D. From November 22, 1982 through December 2, 1982, pursuant to Article III.A, special advertising bulletins for 578 NJTRO train service assignments were advertised. The 1,766 employees who submitted indications of interest under Article II were eligible to bid for these positions. 839 eligible employees actually bid for these advertised positions.

E. In accordance with Article X.D, the standing of employees on the Order Selection List for purposes of bidding assignments with NJTRO is determined on the basis of their earliest retained seniority dates as trainmen with Conrail or a Conrail predecessor railroad. This ranking of employees on the Order Selection List for bidding purposes commonly is referred to as "dovetailing."

F. In recognition of the fact that the employees on the Seniority District G Roster simultaneously were bidding for positions with three new employers (NJTRO, SEPTA, and Amtrak), it was agreed by the parties that the best procedure was for Conrail to award the Amtrak positions first, and then to award the NJTRO positions, in accordance with the procedures described above.

G. The effect of the procedures described above on the awarding of NJTRO positions is illustrated with the following example:

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A senior Conrail train service employee on the Seniority District G Roster with PC prior rights submits a proper indication of interest pursuant to Article II.A of Referee Kasher's Award. In accordance with Articles II.B and X of Referee Kasher's Award and the employee's Conrail seniority, the employee initially is assigned a position on the Order Selection List with Order Selection Number 2 (see Article X.E). This employee then bids for both a NJTRO position pursuant to Article III.A of Referee Kasher's Award in accordance with his dovetailed standing on the Order Selection List, (pursuant to Article X.D) as well as an Amtrak position under the Section 1165 agreement. The employee's bids enable him to obtain an Amtrak position and, in addition, possibly a NJTRO position. The employee is contacted and he elects the Amtrak position and voluntarily withdraws his NJTRO bid. In accordance with Article III.B, since the employee withdraws his NJTRO bid and would otherwise have been awarded a position, he is removed from the NJTRO Order Selection List. As a result, all of the employees with PC prior rights designations on the Order Selection List below the position of Order Selection Number 2 move up to the next available PC prior rights position on the Order Selection List; the other employees on the list do not change positions (i.e., the employee in position number 5 would fill position number 2, the employee in position number 7 would fill position number 5, etc.). *See generally*, Article X.E. of Referee Kasher's Award. The Conrail employee with PC prior rights who had the greatest seniority among those employees not initially placed on the Order Selection List then is placed on the lowest PC prior rights position on the list. The employees standing on the Order Selection List for the awarding of positions would be

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redetermined by dovetailing the revised Order Selection List. This procedure then continues until all of the NJTRO positions are awarded.

6. A preliminary evaluation of the NJTRO Order Selection List indicates the dramatic changes which may occur. Upon information and belief, of the 610 names on the initial Order Selection List included as Exhibit B to C. P. Jones' Affidavit, more than one third of the employees (approximately 228) did not bid for any of the NJTRO positions. As a result, these employees will be removed from the Order Selection List pursuant to Article III.B of Referee Kasher's Award. Approximately 160 employees from the 610 on the initial Order Selection List have bid for Amtrak positions. At this time, it is impossible to determine the number of employees from the initial Order Selection List who may receive positions with either SEPTA or Amtrak and elect to withdraw their NJTRO bid. Though it cannot be determined at this time which employees will be placed on the final Order Selection List, it is clear that a great many of the 610 employees on the preliminary Order Selection List will be replaced with more junior employees. It is anticipated that the final Order Selection List will not be determined until on or about December 22, 1982, when the train service positions are awarded under Referee Kasher's Award.

ROBERT O'NEILL

(Sworn to December 15, 1982.)